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Le Bureau du Procureur
The Office of the Prosecutor

Report on Preliminary Examination Activities 2019

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INTRODUCTION

1. The Office of the Prosecutor ("Office" or "OTP") of the International Criminal Court ("Court" or "ICC") is responsible for determining whether a situation meets the legal criteria established by the Rome Statute ("Statute") to warrant investigation by the Office. For this purpose, the OTP conducts a preliminary examination of all communications and situations that come to its attention based on the statutory criteria and the information available in accordance with its Policy Paper on Preliminary Examinations.[1]

2. The preliminary examination of a situation by the Office may be initiated on the basis of: (i) information sent by individuals or groups, States, intergovernmental or non-governmental organisations; (ii) a referral from a State Party or the United Nations ("UN") Security Council; or (iii) a declaration lodged by a State accepting the exercise of jurisdiction by the Court pursuant to article 12(3) of the Statute.

3. Once a situation is thus identified, the factors set out in article 53(1) (a)-(c) of the Statute establish the legal framework for a preliminary examination.[2] This article provides that, in order to determine whether there is a reasonable basis to proceed with an investigation into the situation, the Prosecutor shall consider: jurisdiction (temporal, either territorial or personal, and material); admissibility (complementarity and gravity); and the interests of justice.

4. *Jurisdiction* relates to whether a crime within the jurisdiction of the Court has been or is being committed. It requires an assessment of (i) temporal jurisdiction (date of entry into force of the Statute, namely 1 July 2002 onwards, date of entry into force for an acceding State, date specified in a UN Security Council referral, or in a declaration lodged pursuant to article 12(3) of the Statute); (ii) either territorial or personal jurisdiction, which entails that the crime has been or is being committed on the territory or by a national of a State Party or a State not Party that has lodged a declaration accepting the jurisdiction of the Court, or arises from a situation referred by the UN Security Council; and (iii) subject-matter jurisdiction as defined in article 5 of the Statute (genocide; crimes against humanity; war crimes, and aggression).

5. *Admissibility* comprises both complementarity and gravity.

6. *Complementarity* involves an examination of the existence of relevant national proceedings in relation to the potential cases being considered for investigation by the Office. This will be done bearing in mind the Office's prosecutorial strategy of investigating and prosecuting those most responsible for the most

[1] See ICC-OTP, Policy Paper on Preliminary Examinations, November 2013.
[2] See also rule 48, ICC Rules of Procedure and Evidence ("Rules").

serious crimes.[3] Where relevant domestic investigations or prosecutions exist, the Office will assess their genuineness.

7. *Gravity* includes an assessment of the scale, nature, manner of commission of the crimes, and their impact, bearing in mind the potential cases that would likely arise from an investigation of the situation.

8. The *"interests of justice"* is a countervailing consideration. The Office must assess whether, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would *not* serve the interests of justice.

9. There are no other statutory criteria. Factors such as geographical or regional balance are not relevant criteria for a determination that a situation warrants investigation under the Statute. As long as universal ratification is not yet a reality, crimes in some situations may fall outside the territorial and personal jurisdiction of the ICC. This can be remedied only by the relevant State becoming a Party to the Statute or lodging a declaration accepting the exercise of jurisdiction by the Court or through a referral by the UN Security Council.

10. As required by the Statute, the Office's preliminary examination activities are conducted in the same manner irrespective of whether the Office receives a referral from a State Party or the UN Security Council, or acts on the basis of information on crimes obtained pursuant to article 15 of the Statute. In all circumstances, the Office analyses the seriousness of the information received and may seek additional information from States, organs of the UN, intergovernmental and non-governmental organisations and other reliable sources that are deemed appropriate. The Office may also receive oral testimony at the seat of the Court. All information gathered is subjected to a fully independent, impartial and thorough analysis.

11. It should be recalled that the Office does not possess investigative powers at the preliminary examination stage. Its findings are therefore preliminary in nature and may be reconsidered in the light of new facts or evidence. The preliminary examination process is conducted on the basis of the facts and information available. The goal of this process is to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation. The 'reasonable basis' standard has been interpreted by Pre-Trial Chamber ("PTC") II to require that "there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court 'has been or is being

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[3] See OTP Strategic Plan – 2019-2021, para. 24. When appropriate, the Office will consider bringing cases against notorious or mid-level perpetrators who are directly involved in the commission of crimes, to provide deeper and broader accountability and also to ultimately have a better prospect of conviction in potential subsequent cases against higher-level accused.

committed'".[4] In this context, PTC II has indicated that all of the information need not necessarily "point towards only one conclusion."[5] This reflects the fact that the reasonable basis standard under article 53(1)(a) "has a different object, a more limited scope, and serves a different purpose" than other higher evidentiary standards provided for in the Statute.[6] In particular, at the preliminary examination stage, "the Prosecutor has limited powers which are not comparable to those provided for in article 54 of the Statute at the investigative stage" and the information available at such an early stage is "neither expected to be 'comprehensive' nor 'conclusive'."[7]

12. Before making a determination on whether to initiate an investigation, the Office also seeks to ensure that the States and other parties concerned have had the opportunity to provide the information they consider appropriate.

13. There are no timelines provided in the Statute for a decision on a preliminary examination. The Office takes no longer than is necessary to complete a thorough assessment of the statutory criteria to arrive at an informed decision. Depending on the facts and circumstances of each situation, the Office may decide either (i) to decline to initiate an investigation where the information manifestly fails to satisfy the factors set out in article 53(1) (a)-(c); (ii) to continue to collect information in order to establish a sufficient factual and legal basis to render a determination; or (iii) to initiate the investigation, subject to judicial review as appropriate.

14. In order to promote transparency of the preliminary examination process, the Office issues regular reports on its activities, and provides reasons for its decisions either to proceed or not proceed with investigations.

15. In order to distinguish the situations that do warrant investigation from those that do not, and in order to manage the analysis of the factors set out in article 53(1), the Office has established a filtering process comprising four phases. While each phase focuses on a distinct statutory factor for analytical purposes, the Office applies a holistic approach throughout the preliminary examination process.

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[4] Situation in the Republic of Kenya, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, 31 March 2010, para. 35 ("Kenya Article 15 Decision").

[5] Kenya Article 15 Decision, para. 34. In this respect, it is further noted that even the higher "reasonable grounds" standard for arrest warrant applications under article 58 does not require that the conclusion reached on the facts be the only possible or reasonable one. Nor does it require that the Prosecutor disprove any other reasonable conclusions. Rather, it is sufficient to prove that there is a reasonable conclusion alongside others (not necessarily supporting the same finding), which can be supported on the basis of the evidence and information available. Situation in Darfur, Sudan, "Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'", ICC-02/05-01/09-OA, 3 February 2010, para. 33.

[6] Kenya Article 15 Decision, para. 32.

[7] Kenya Article 15 Decision, para. 27.

- Phase 1 consists of an initial assessment of all information on alleged crimes received under article 15 ('communications'). The purpose is to analyse the seriousness of information received, filter out information on crimes that are outside the jurisdiction of the Court and identify those that appear to fall within the jurisdiction of the Court. In practice, the Office may occasionally encounter situations where alleged crimes are not manifestly outside the jurisdiction of the Court, but do not clearly fall within its subject-matter jurisdiction. In such situations, the Office will first consider whether the lack of clarity applies to most, or a limited set of allegations, and in the case of the latter, whether they are nevertheless of such gravity to justify further analysis. The Office will then consider whether the exercise of the Court's jurisdiction may be restricted due to factors such as a narrow geographic and/or personal scope of jurisdiction and/or the existence of national proceedings relating to the relevant conduct. In such situations, it will endeavour to give a detailed response to the senders of such communications outlining the Office's reasoning for its decisions.

- Phase 2 focuses on whether the preconditions to the exercise of jurisdiction under article 12 are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court. Phase 2 analysis entails a thorough factual and legal assessment of the alleged crimes committed in the situation at hand, with a view to identifying potential cases falling within the jurisdiction of the Court. The Office may further gather information on relevant national proceedings if such information is available at this stage.

- Phase 3 focuses on the admissibility of potential cases in terms of complementarity and gravity. In this phase, the Office will also continue to collect information on subject-matter jurisdiction, in particular when new or ongoing crimes are alleged to have been committed within the situation.

- Phase 4 examines the interests of justice consideration in order to formulate the final recommendation to the Prosecutor on whether there is a reasonable basis to initiate an investigation.

16. In the course of its preliminary examination activities, the Office also seeks to contribute to two overarching goals of the Statute: the ending of impunity, by encouraging genuine national proceedings, and the prevention of crimes, thereby potentially obviating the need for the Court's intervention. Preliminary examination activities therefore constitute one of the most cost-effective ways for the Office to fulfil the Court's mission.

Summary of activities performed in 2019

17. This report summarises the preliminary examination activities conducted by the Office between 1 December 2018 and 30 November 2019.

18. During the reporting period, the Office completed and closed one preliminary examination. On 4 July 2019, the Office requested authorisation from Pre-Trial Chamber III to proceed with an investigation into the situation concerning the alleged deportation of the Rohingya people from the Republic of the Union of Myanmar ("Myanmar") to the People's Republic of Bangladesh ("Bangladesh"). Such authorisation was granted on 14 November 2019.

19. On 12 April 2019, Pre-Trial Chamber II ("PTC II") rejected the request of the Prosecutor to proceed with an investigation of the situation in the Islamic Republic of Afghanistan. The Prosecutor requested leave to appeal the decision, which was subsequently granted by PTC II on 17 September 2019. The Prosecutor's brief was filed on 30 September 2019, and an appeal hearing has been set down for 4-6 December 2019. The Appeals Chamber has invited the participation of various *amici curiae*, and is also seized of submissions by the legal representatives of victims who made representations before PTC pursuant to article 15(3) of the Statute.

20. With respect to the situation on the registered vessels of the Union of the Comoros ("Comoros"), the Hellenic Republic and the Kingdom of Cambodia, on 2 September 2019, the Appeals Chamber dismissed the appeal of the Prosecutor against Pre-Trial Chamber I ("PTC I")'s decision setting aside the Prosecutor's reconsideration, pursuant to rule 108(3) of the Rules, of her determination that there was no reasonable basis to proceed in the situation referred by the Comoros. The Appeals Chamber directed the Prosecutor that she must apply the legal interpretations of the majority of PTC I, as it was composed in 2015, and to notify PTC I of her reasoning and conclusions by 2 December 2019, which have since been filed.

21. The Office further continued its preliminary examinations of the situations in Colombia, Guinea, Iraq/United Kingdom ("UK"), Nigeria, Palestine, the Philippines, Ukraine, and Venezuela. During the reporting period, the Office sent preliminary examination missions to Bangladesh, Guinea, Nigeria and Ukraine, and held numerous consultations at the seat of the Court with State authorities, representatives of international and non-government organisations, article 15 communication senders and other interested parties.

22. Pursuant to the Office's Policy Paper on Sexual and Gender-based crimes and Policy on Children, during the reporting period, the Office conducted, where appropriate, an analysis of alleged sexual and gender-based crimes and crimes against children that may have been committed in various situations under preliminary examination and sought information on national investigations and prosecutions by relevant national authorities on such conduct.

I. SITUATIONS UNDER PHASE 1

23. Between 1 November 2018 and 31 October 2019, the Office received 795 communications pursuant to article 15 of the Statute. Per standard practice, all of such communications received were carefully reviewed by the Office in order to assess whether the allegations contained therein concerned: (i) matters which are manifestly outside of the jurisdiction of the Court; (ii) a situation already under preliminary examination; (iii) a situation already under investigation or forming the basis of a prosecution; or (iv) matters which are neither manifestly outside of the Court’s jurisdiction nor related to an existing preliminary examination, investigation or prosecution, and therefore warrant further factual and legal analysis by the Office. Following this filtering process, the Office determined that of the communications received in the reporting period, 617 were manifestly outside the Court's jurisdiction; 112 were linked to a situation already under preliminary examination; 25 were linked to an investigation or prosecution; and 41 warranted further analysis.

24. The communications deemed to warrant further analysis (“WFA communications”) relate to a number of different situations alleged to involve the commission of crimes. The allegations are subject to more detailed factual and legal analysis, the purpose of which is to provide an informed, well-reasoned recommendation on whether the allegations in question appear to fall within the Court’s jurisdiction and warrant the Office proceeding to Phase 2 of the preliminary examination process. For this purpose, the Office prepares a dedicated internal analytical report (“Phase 1 Report”).

25. Since mid-2012, the Office has produced over 50 Phase 1 reports relating to WFA communications, analysing allegations on a range of subjects concerning situations in regions throughout the world. At present, such further Phase 1 analysis is being conducted in relation to several different situations, which were brought to the Office’s attention via article 15 communications.

26. During the reporting period, the Office responded to the senders of communications with respect to four situations that had been subject to further analysis. Following a thorough assessment in each of these situations, the Office concluded that the alleged crimes in question did not appear to fall within the Court’s jurisdiction, and thus the respective communication senders were informed in accordance with article 15(6) of the Statute and rule 49(1) of the Rules. Such notice nonetheless advises senders, in line with rule 49(2) of the Rules, of the possibility of submitting further information regarding the same situation in the light of new facts and evidence.

27. The relevant conclusions reached by the Office in those four Phase 1 situations, along with a brief summary of the reasoning underlying them, are included below, with due regard to its duties under rule 46 of the Rules. The Office is finalising its response to senders of communications with respect to a number of

other communications that have warranted further analysis, which will be issued during 2020.

(i) North Korea (dual nationality)

28. In 2016, the Office received a communication alleging that the Supreme Leader of North Korea is responsible for a number of serious crimes under the Court's jurisdiction, allegedly committed in the territory of the Democratic People's Republic of Korea ("DPRK"). It was alleged that although the DPRK is not a State Party to the Rome Statute, the Court may nonetheless exercise personal jurisdiction over its Supreme Leader pursuant to article 12(2)(b) of the Statute, given that, under South Korean domestic law, he may also be considered a national of the Republic of Korea ("ROK"), a State Party to the Statute.

29. In considering the allegations received, the Office's assessment was limited to determining whether it should recognise and give effect to any such nationality conferred by the ROK Constitution, for the purposes of exercising personal jurisdiction pursuant to article 12(2)(b) of the Statute. Nationality is generally considered to be exclusively within the domestic jurisdiction of a State, in that international law leaves it to each State to regulate how it grants its own nationality.[8] Nevertheless, the nationality granted by a State on the basis of its domestic laws is not automatically binding on international courts and tribunals.[9] It remains within the competence of the Court to determine how competing or contested nationality claims should be treated for the purpose of the exercise of its own jurisdiction.

30. The Office understands that under the domestic law of the ROK, North Koreans are recognised as being South Korean nationals from birth, on the basis of the ROK Constitution and the ROK Nationality Act and as confirmed by the Supreme Court of South Korea. In particular, article 3 of the Constitution of the ROK states that "the territory of Republic of Korea shall consist of the Korean peninsula and its adjacent islands". The designation 'Korean peninsula' in this respect refers to both North and South Korea, reflective of the ROK's claim of sovereignty over not only the territory of South Korea, but also over North Korea and its nationals. Accordingly, the Office understands that under article 3 of the South Korean Constitution, North Koreans in principle also possess South Korean nationality at birth. That is to say, provisions of the ROK's Nationality Act governing acquisition of ROK nationality by birth therefore apply equally to people of South and North Korea – an interpretation which was confirmed by the Supreme Court of South Korea. Based on the Supreme Court's interpretation of the ROK Constitution, the South Korean authorities have expressed that there is an 'assumption' that North Koreans can acquire South Korean citizenship.

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[8] *Nottebohm Case (Liech. v. Guat.), Second Phase, Judgment of April 6th, 1955 ICJ Reports 1955*, p. 23. See also *ibid*., p. 20.

[9] *Delalić et al*., IT-96-21-A, ICTY Appeal Judgement, 20 February 2001, para. 77.

31. Nonetheless, based on the information available, such recognition appears to correspond more to an entitlement to South Korean nationality. In this regard, the information available suggests that in order to give effect to such potential entitlement, North Koreans must first initiate one of the available procedures to formally acquire ROK citizenship, procedures which require either presenting oneself to a ROK embassy or consulate or otherwise taking legal action while present in South Korea. Prior to such process, it appears that in practice, North Koreans are neither treated as South Korean nationals by the ROK government nor afforded the rights and protections enjoyed by (and guaranteed under the constitution to) South Korean nationals, such as diplomatic protection abroad or the automatic right to enter and reside in South Korea. Such circumstances tend to undermine the position that the Office should recognise and give effect to the putative possession by North Koreans of South Korean nationality from birth, given that the lack of availability of such rights and benefits – which are typically associated with nationality – tend to suggest that in practice, the nationality is not effective simply from the time of birth.

32. In addition, while North Koreans may be notionally recognised as South Korean nationals under South Korean domestic legislation, it appears that all North Korean citizens may not be accepted by ROK authorities as South Korean, following the evaluation required to realise ROK citizenship. In this respect, information available suggests that beyond mere formalities, certain criteria must indeed be met for formal recognition or acquisition of nationality and associated rights. In particular, some information available appears to indicate that not all North Koreans may in fact be eligible for South Korean nationality, and that pursuant to the ROK's Protection Act, for example, the government has discretion to refuse to grant South Korean nationality to those persons who do not express their desire and intention to receive protection from South Korea and reside there, have certain types of criminal histories, and/or have resided or settled for a considerable period of time in another country. Such conditions, as well as the related clarifications by certain South Korean authorities over the years, tend to further suggest that prior to undergoing the relevant process and evaluation by South Korean authorities, North Koreans are in practice not recognised by the ROK as already in fact possessing South Korean nationality. In addition, such conditions imply that acquisition of South Korean nationality in such cases is not necessarily simply a matter of entitlement, which merely requires formal application. Rather, based on the information available, it appears that the ROK authorities retain discretion in granting nationality to North Koreans. In this regard, in practical effect, it may be considered that North Koreans in general do not already possess South Korean nationality, but may indeed be able to acquire it, depending on the circumstances.

33. Accordingly, the purported possession by North Koreans of *de jure* South Korean nationality from birth may more appropriately be viewed as 'theoretical', as in practice the recognition of nationality as reflected in the Constitution does not appear to translate into automatic possession of South Korean nationality. Instead, it appears that under the relevant provisions of the ROK Constitution,

Nationality Act, and Protection Act, North Koreans may be officially granted South Korean nationality if they take the required steps to receive such formal recognition and are deemed to meet the relevant criteria.

34. Finally, the Office acknowledges that courts and tribunals in certain countries have recognised the dual nationality of North Korean refugees. However, such practice is not uniform. Overall, in the circumstances, the Office considered that such other determinations did not warrant significant weight, given: (i) the lack of consensus and consistent approach by such tribunals and courts across (and within) different countries in relation to this issue; and (ii) the limited and particular context in which such determinations were made, namely for the purpose of assessing asylum claims insofar as whether the claimants qualified for protection as 'refugees' under article 1(A)(2) of the Refugee Convention.

35. Ultimately, in light of the above-mentioned considerations, it does not appear that the notional recognition of nationality contained in the Constitution of the ROK can be given effect by the Court and therefore be relied upon to exercise personal jurisdiction over North Koreans in general (or any individual in particular) under article 12(2)(b) of the Statute, based on the active personality principle. In such circumstances, the Office concluded that the pre-conditions for exercise of the Court's jurisdiction are not met, as the alleged crimes referred to in the communication received were neither committed on the territory of a State Party nor by a national of a State Party, nor has the UN Security Council otherwise referred the situation in question.

(ii) North Korea (overseas labourers on the territory of States Parties)

36. In 2017, the Office received a communication alleging that nationals of the Democratic People´s Republic of Korea ("DPRK" or "North Korea") are engaged in forced labour overseas that amounts to the crime against humanity of enslavement. In this regard, the crimes in question were allegedly committed in the territories of a number of States Parties, thereby enabling the Court to exercise territorial jurisdiction over the alleged conduct despite the fact that the DPRK is not a State Party to the Rome Statute.

37. The information available indicates that the government of DPRK recruits and dispatches thousands of its nationals to work overseas, including in a number of States Parties in Europe, Africa, South America and Asia. Open sources tend to corroborate that North Korean overseas workers have typically been subjected to harsh working and living conditions, exploitative labour practices (such as in relation to the extortion of their wages), and surveillance and related restrictions, such as on their movements, contact with others, conditions of residence, and work schedules. These violations appear to flow from exploitative practices of the North Korean authorities in apparent efforts to cut costs and ensure that workers remain effectively under their control during overseas work engagements.

38. At the same time, it also appears that the working and living conditions of North Korean workers abroad vary significantly between host countries, and/or within them, depending on a variety of factors. In particular, the more detailed accounts of particularly serious alleged abuses and/or harsh treatment and working conditions typically appear to relate to North Koreans workers located in the territories of non-States Parties. According to the information available, it does not appear that such particular reported experiences are necessarily illustrative or representative of the general overall conditions or conduct occurring across all countries where North Korean workers have been dispatched by the DPRK government.

39. Even assuming the work carried out by North Koreans dispatched abroad, in certain instances, may amount to 'forced labour', it does not appear that such forced labour, under the circumstances presented, entails the level of deprivation of liberty required in order to fall within the scope of the crime of enslavement under article 7(1)(c) of the Statute. For example, the Elements of Crimes recognises that certain practices, such as forced labour, may amount to enslavement in circumstances when the deprivation of liberty imposed is to such a degree or extent as to meet the requirements of the crime under article 7(1)(c). Such deprivation of liberty must amount to the exercise by the perpetrator of any or all of the powers attaching to the right of ownership over such persons.

40. In the case of the North Korean overseas workers, the information available indicates that North Korean authorities exercise a certain level of control and coercion over the workers during their engagements abroad, which has resulted in the workers generally being subjected to a number of deprivations and exploitative labour conditions. However, it does not appear that the form or degree of control exercised by the relevant North Korean authorities, with respect to the alleged conduct occurring on the territory of States Parties, rises to the level of exercising the powers attached to the right of ownership. While the workers' personal autonomy is subject to certain restrictions, such limitations imposed by North Korean authorities do not appear to entail a subjugation of the workers or reducing them to a servile status within the meaning of article 7(1)(c) of the Statute. For example, in Mongolia as well as at least some locations in Poland, workers apparently retain some degree of freedom and autonomy (such as to seek outside employment to supplement their incomes) as well as freedom of movement, albeit subject to certain conditions. Further, with respect to workers dispatched to the territory of States Parties, while it appears that workers may face certain types of penalties (such as monetary sanctions or repatriation) if they disobey the orders or rules imposed, this does not appear to rise to the level of severity required to constitute a crime within the jurisdiction of the Court.

41. Regarding the nature and duration of such assignments, it does not appear that the workers are dispatched to work abroad for an unlimited or indefinite duration, but instead for fixed terms. Their situation or condition, with respect to

the overseas work placement, is not permanent, but subject to change. There is also no information indicating that once they return home after the end of the term, they are under any obligation (or may otherwise be forced) to go to another work placement abroad. Rather, reportedly some workers who have returned to the DPRK themselves reapply to be selected for another overseas work position. Moreover, while indeed workers apparently face financial obstacles in trying leaving their overseas jobs prior to the end of the relevant term, this also does not appear to be impossible. Accordingly, while North Korean overseas workers dispatched to States Parties are reportedly subject to deprivations of liberty as well as exploitative working conditions and practices, it does not appear that their situation is, on the whole, comparable to conditions of slavery or amount to the crime of enslavement under article 7(1)(k) of the Statute.[10]

42. Beyond the alleged crime of enslavement, the Office has also considered whether any of the related alleged conduct, committed in the context of the dispatch of North Korean workers to the territory of States Parties, could amount to other forms of conduct under article 7(1) of the Statute. With respect to imprisonment or other severe deprivation of physical liberty, although it appears that in some reported cases, workers have been detained in North Korean-run detention facilities in host countries (as a form of punishment), there is insufficient information demonstrating such conduct occurred on the territory of States Parties. Otherwise, with respect to the territory of States Parties, while the North Korean workers' movements appear generally to be subject to certain restrictions and to be monitored and while workers appear to be subject to other forms of control (including surveillance), it does not appear that such circumstances can be equated with captivity in an enclosed environment or other severe deprivation of liberty within the meaning of article 7(1)(e). Similarly, despite the harsh conditions in which some North Koreans are required to work and live during their placements abroad on the territory of States Parties, such conduct does not appear to amount to the crime of torture under article 7(1)(f), nor other inhumane acts under article 7(1)(k).

43. These findings are without prejudice to the responsibility of host States or of North Korea under their domestic and international law obligations more generally. In particular, the information available suggests that during their overseas placements North Korean workers have often been subjected to living and working conditions and practices which may give rise to various human rights violations as well as violations of international labour laws and standards. However, for the reasons set out above, the alleged conduct does not appear to constitute one of the underlying acts of crimes against humanity under the Statute.

[10] See e.g. *Siliadin v. France*, App. No. 73316/01, ECHR, 26 October 2005, paras. 122-129.

(iii) Philippines (South China Sea)

44. In early 2019, the Office received a communication alleging that Chinese officials have committed crimes against humanity within the Court's jurisdiction in connection with certain activities committed in particular areas of the South China Sea. The communication alleged that China has (i) intentionally and forcibly excluded Philippine nationals from making use of the resources in certain relevant areas of the sea (such as blocking Filipino fishermen's access to traditional fishing grounds at Scarborough Shoal); (ii) engaged in massive illegal reclamation and artificial island-building in the Spratly Islands, causing significant damage to the marine life in the area; and (iii) tolerated and actively supported illegal and harmful fishing practices by Chinese nationals, which likewise has caused serious environmental damage. The communication alleged that such conduct not only violates the law of sea but gives rise to crimes against humanity, namely other inhumane acts and persecution under articles 7(1)(k) and 7(1)(h) of the Statute. The communication alleged that the crimes fall within the Court's territorial jurisdiction as they occurred in particular within Philippines' exclusive economic zone ("EEZ") and continental shelf, including in Scarborough Shoal and the Kalayaan Island Group, and that the acts occurred within the period when the Philippines was a State Party to the Statute.

45. With respect to these allegations, the focus of the Office's analysis primarily turned on an initial threshold issue of whether the preconditions to the exercise of the Court's jurisdiction are met: i.e. whether a State's EEZ falls within the scope of its territory under article 12(2)(a) of the Statute.

46. The crimes referred to in the communication were allegedly committed by Chinese nationals in the territory of the Philippines. China is not a State Party to the Rome Statute. Accordingly, the Court lacks personal jurisdiction. However, the Court may exercise territorial jurisdiction over the alleged crimes to the extent that they may have been committed in Philippine territory during the period when the Philippines was a State Party, namely 1 November 2011 until 16 March 2019. The information available confirms that the alleged conduct in question occurred in areas that are outside of the Philippines' territorial sea (i.e., in areas farther than 12 nautical miles from its coast), but nonetheless within areas that may be considered to fall within its declared EEZ. In this context, the Office's analysis has been conducted *ad arguendo* without taking a position on the different disputed claims with respect to these areas. However, the Office has concluded that a State's EEZ (and continental shelf) cannot be considered to comprise part of its 'territory' for the purpose of article 12(2)(a) of the Statute.

47. Article 12(2)(a) of the Statute provides that the Court may exercise its jurisdiction in two circumstances: (i) if the "State on the territory of which the conduct in question occurred" is a State Party to the Statute, or (ii) if the "crime was committed" on board a vessel or aircraft registered in a State Party. In the present situation, only the first scenario is potentially applicable. While the Statute does not provide a definition of the term, it can be concluded that the

'territory' of a State, as used in article 12(2)(a), includes those areas under the sovereignty of the State, namely its land mass, internal waters, territorial sea, and the airspace above such areas. Such interpretation of the notion of territory is consistent with the meaning of the term under international law.

48. Notably, maritime zones beyond the territorial sea, such as the EEZ and continental shelf, are not considered to comprise part of a State's territory under international law. This follows from the consideration that under international law, State territory refers to geographic areas under the sovereign power of a State – i.e., the areas over which a State exercises exclusive and complete authority. As expressed in the *Island of Palmas* case, "sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular state."[11] Coastal States, however, do not have sovereignty over maritime zones beyond the territorial sea, which essentially marks the seaward frontier of States. Instead, Coastal States may possess only a more limited set of 'sovereign rights' in respect of certain maritime areas beyond the territorial sea, such as the EEZ and continental shelf.

49. Under the law of the sea, a distinction is made in this regard between 'sovereignty' and 'sovereign rights', in terms of what powers a State may exercise in a particular maritime zone. In the context of the law of the sea, the sovereignty of a State implies its exclusive legal authority over all its internal waters and territorial sea (and where applicable, the archipelagic waters). By contrast, in maritime zones beyond the territorial sea (areas sometimes referred to as 'international waters'), international law confers certain prerogatives on a Coastal State (and to the exclusion of others), such as fiscal, immigration, sanitary and customs enforcement rights in the contiguous zone and natural resource-related rights in the EEZ and the continental shelf. Such 'sovereign rights' are limited to specific purposes, as enumerated in UN Convention on the Law of the Sea ("UNCLOS"), but do not permit the State to exercise full powers over such areas, as sovereignty might allow.

50. Overall, in the Office's view, the EEZ (and continental shelf) cannot be equated to territory of a State within the meaning of article 12 of the Statute, given that the term 'territory' of a State in this provision should be interpreted as being limited to the geographical space over which a State enjoys territorial sovereignty (i.e., its landmass, internal waters, territorial sea and the airspace above such areas). Criminal conduct which takes place in the EEZ and continental shelf is thus in principle outside of the territory of a Coastal State and as such, is not encompassed under article 12(2)(a) of the Statute (unless such conduct otherwise was committed on board a vessel registered in a State Party). This circumstance is not altered by the fact that certain rights of the Coastal State are recognised in these areas. While UNCLOS confers functional jurisdiction to the State for particular purposes in such areas, this conferral does not have the

[11] *Island of Palmas case (Netherlands, USA)*, 2 Reports of International Arbitral Awards 829, 838 (1928).

effect of extending the scope of the relevant State's territory but instead only enables the State to exercise its authority *outside* its territory (i.e., extraterritorially) in certain defined circumstances.

51. In the present situation, the conduct alleged in the communication received did not occur in the territory of the Philippines, but rather in areas outside its territory, purportedly in its EEZ and continental shelf. Further, while article 12(2)(a) also extends the Court's jurisdiction to crimes committed on board vessels registered in a State Party, this condition likewise is not met, given that the alleged crimes were purportedly committed on board Chinese registered vessels. Finally, as previously highlighted, the remaining basis for the exercise jurisdiction (active personality) under article 12(2)(b) is also not met, given the Chinese nationality of the alleged perpetrators in question. Accordingly, the Office concluded that the crimes allegedly committed do not fall within the territorial or otherwise personal jurisdiction of the Court.

(iv) Yemen (State Party nationals - mercenaries)

52. In 2017, the Office received a communication alleging that State Party nationals acting as mercenaries for the United Arab Emirates ("UAE") have committed war crimes within the Court's jurisdiction during the ongoing conflict in Yemen.

53. The Court does not have territorial jurisdiction over crimes allegedly committed in Yemen: Yemen is not a State Party to the Rome Statute; it has not made an article 12(3) declaration; nor has the UN Security Council otherwise referred the situation. However, the Court may exercise personal jurisdiction over nationals of States Parties responsible for crimes in Yemen, pursuant to article 12(2)(b) of the Statute. The communication received specifically identified nationals of the following States Parties as having been engaged as mercenaries in Yemen and potentially implicated in the commission of crimes: Australia, Chile, Colombia, El Salvador, Panama, and South Africa. As the Rome Statute had entered into force for each of these countries, except El Salvador, by March 2015 (the date from which the sender alleges relevant crimes), the Court could exercise personal jurisdiction over nationals of these States who may be criminally responsible for the alleged crimes. With respect to nationals of El Salvador, the Court would only have jurisdiction over crimes committed after 1 June 2016.

54. Following a thorough factual assessment, the Office concluded that, according to the information available at this stage, it does not appear that crimes within the jurisdiction of the Court have been committed by, or otherwise implicate, nationals of States Parties engaged as mercenaries. Open source information suggests that some State Party nationals engaged as mercenaries may have been involved with the UAE Presidential Guard in various capacities. However, there is no information available connecting such persons to the commission of alleged crimes. Similarly, while reportedly some State Party nationals have been killed fighting in Yemen and certain individuals have worked for the UAE armed forces, there is insufficient information at this stage on whether such individuals

were involved in the alleged commission of crimes. With respect to the remaining relevant allegation contained in the communication received, similarly, there is insufficient information on whether State Party nationals engaged as mercenaries have been involved in alleged crimes reported to have occurred in UAE-operated prisons and detention sites in Yemen.

55. Accordingly, while the Office remains concerned about the reported widespread violations of international humanitarian law in the context of the armed conflict in Yemen, it has concluded that, based on the information available at this stage, it does not appear that State Party nationals engaged as mercenaries in Yemen are responsible for the crimes alleged in the communication.

56. The Office notes that its findings are limited to the alleged conduct of State Party nationals engaged as mercenaries in Yemen and are without prejudice to other communications that have been received with respect to the armed conflict in Yemen.

II. SITUATIONS UNDER PHASE 2 (SUBJECT-MATTER JURISDICTION)

VENEZUELA

Procedural History

57. The situation in the Bolivarian Republic of Venezuela ("Venezuela") has been under preliminary examination since 8 February 2018. During the reporting period, the Office continued to receive communications pursuant to article 15 in relation to this situation.

58. On 8 February 2018, following a careful, independent and impartial review of a number of communications and reports documenting alleged crimes potentially falling within the ICC's jurisdiction, the Prosecutor opened a preliminary examination of the situation in Venezuela since at least April 2017.[12]

59. On 27 September 2018, the Office received a referral from a group of States Parties to the Statute, namely the Argentine Republic, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru (the "referring States"), regarding the situation of Venezuela. Pursuant to article 14 of the Statute, the referring States requested the Prosecutor to initiate an investigation for crimes against humanity allegedly committed in the territory of Venezuela since 12 February 2014, with a view to determining whether one or more persons should be charged with the commission of such crimes.[13] In this regard, noting the findings of a number of reports pertaining to the human rights situation in Venezuela, the referring States indicated that the report of the General Secretariat of the Organisation of American States ("OAS") on the possible commission of crimes against humanity in Venezuela is to be considered as supporting documentation.

60. On 28 September 2018, the Presidency of the ICC assigned the situation in Venezuela to Pre-Trial Chamber I.[14]

Preliminary Jurisdictional Issues

61. Venezuela deposited its instrument of ratification to the Statute on 7 June 2000. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Venezuela or by its nationals from 1 July 2002 onwards.

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[12] ICC-OTP, Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela, 8 February 2018.

[13] ICC-OTP, Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on the referral by a group of six States Parties regarding the situation in Venezuela, 27 September 2018.

[14] ICC Presidency, Decision assigning the situation in the Bolivarian Republic of Venezuela to Pre-Trial Chamber I, ICC-02/18-1, 28 September 2018.

Contextual Background

<u>*Demonstrations between February 2014 and April 2017*</u>

62. Between February and May 2014, a series of protests started in Venezuela when university students rallied to denounce high levels of insecurity in the country. Exacerbated by popular discontent, high inflation, scarcity of basic staples and spiralling criminality, thousands of anti-government demonstrations rapidly spread across Venezuela. In this context, clashes between demonstrators and security forces reportedly resulted in dozens of deaths in both camps. It is further alleged that thousands of demonstrators were arrested and detained by security forces. Arrests of opposition leaders for their alleged support to violent demonstrations led to an escalation of anti-government protests.

63. Mass anti-government demonstrations resumed in February 2015. While mostly peaceful, some isolated instances of violence were reported, mainly in Caracas and in the state of Táchira. In subsequent months, allegations of due process violations in the arrest and prosecution of opposition leaders further exacerbated political tensions. In December 2015, the opposition won a two-thirds majority of the seats in parliament, thus obtaining the necessary votes to amend the Constitution, remove Supreme Court magistrates and appoint key officials, including the Attorney General.

64. Growing tensions between the Government and the opposition continued throughout 2016, in particular after the announcement of the opposition's plans to trigger a recall referendum against President Nicolás Maduro, which led to further waves of anti-government demonstrations nation-wide. As the economic situation and living standards degraded, thousands of civilians rallied against the Venezuelan Government. In parallel, thousands of pro-government supporters protested against the United States of America for its declaration of Venezuela as a "national security threat" and for imposing sanctions against State officials over alleged human rights abuses.

<u>*Wave of anti-government demonstrations and escalation of violence (April – July 2017)*</u>

65. Between April and July 2017, Venezuela experienced an upsurge in political unrest, including a new wave of demonstrations with thousands of protestors against President Maduro's Government, after the Supreme Court issued two rulings assuming the powers of the National Assembly and limiting parliamentary immunity. Venezuelan opposition parties described the Supreme Court's initiative as a "coup", and called for demonstrations demanding that the Government re-institute the division of powers, hold presidential elections, release political prisoners, and alleviate shortages of medical supplies and food. The Government's response to the protests held between April and July 2017 included the frequent deployment of State security forces to carry out public order operations. In April 2017, the Venezuelan Government reportedly put into

action an emergency plan - known as "*Plan Zamora*" - to curb the demonstrations.

66. On 1 May 2017, President Maduro announced plans to replace the National Assembly with a new National Constituent Assembly (*Asamblea Nacional Constituyente*, "ANC"), which would be tasked with drafting a new constitution – a move which was met with further widespread protests. On 17 May 2017, a second phase of *Plan Zamora* was launched. Around 2,000 members of the Bolivarian National Guard and 600 military troops were reportedly deployed during this phase to control public demonstrations in Venezuela.

67. The election for the ANC was held on 30 July 2017 and President Maduro's Party and allies won all of the 545 seats in the new legislative body. The opposition boycotted the election, alleging that it was fraudulent and would erode democracy in the country. A number of States and observers condemned the establishment of the ANC, and expressed their support to the National Assembly.

68. Thousands of actual or perceived members of the opposition were reportedly injured and arrested over the course of demonstrations held between April and July 2017. Additionally, it was reported that some groups of anti-government protestors resorted to violent means, in some cases targeting security forces, resulting in some members of such forces being injured or killed.

69. A significant number of those arrested were allegedly brought before military courts and, in a number of cases, those detained in the context of the protests were reportedly subjected to serious abuses and ill-treatment. From August 2017 onwards, although mass protests generally ceased, security forces reportedly continued to detain actual or perceived opposition supporters, though more selectively, and allegedly subjected some to ill-treatment or torture in detention.

Political crisis following presidential election in 2018

70. On 20 May 2018, a presidential election, boycotted by part of the opposition, was held in Venezuela. According to official results, incumbent President Maduro was re-elected for a second six-year term, amid allegations of fraud and widespread irregularities. Following the announcement of Maduro's victory, the Lima Group, a body composed of 14 Latin-American States and Canada, created in 2017 to address the political crisis in Venezuela, decided not to recognise the legitimacy of the electoral process alleging that it failed to meet "international standards for a democratic, free, fair and transparent process." Other States and international organisations also condemned President Maduro's election and imposed sanctions against high-ranking Venezuelan officials.

71. In January 2019, hundreds of thousands of civilians took to the streets across Venezuela, mainly in Caracas, to demand that Maduro step down from power and organise free presidential elections. The nation-wide rally was convened by

Juan Guaidó, the recently-elected President of the dismissed National Assembly. A number of smaller demonstrations were also organised in various cities, resulting in some episodes of looting and unrest.

72. On 23 January 2019, Guaidó declared himself acting interim President of Venezuela ("*Presidente Encargado*") invoking the Constitution, and called for the establishment of a transitional government and the holding of presidential elections. Reportedly, over 60 States, including the referring States, the US, France, the UK, Brazil and Costa Rica, have since recognised Guaidó as Venezuela's Interim President; while another 50 UN member States continue to recognise President Maduro's Government, including China, Russia, Turkey and Iran.

Subject-Matter Jurisdiction

73. The preliminary examination has focussed primarily on crimes allegedly committed in Venezuela since at least April 2017. Nonetheless, the Office has also sought to place these events in the context of previous waves of violence and political unrest, including with respect to conduct occurring from February 2014 onwards. This exercise has been conducted to examine the potential linkage of those events to allegations of crimes committed after April 2017.

74. With respect to events since April 2017, it has been alleged that State security forces frequently used excessive force to disperse and put down demonstrations, and arrested and detained thousands of civilians, a number of whom were allegedly subjected to serious abuse and ill-treatment in detention. It has also been reported that some groups of protestors resorted to violent means, resulting in some members of security forces being injured or killed. State forces have also, on some occasions, reportedly collaborated with pro-Government armed civilians, including groups referred to as "*colectivos*", who are also alleged to have perpetrated a number of violent acts against demonstrators, actual or perceived opposition members and activists, elected officials and students.

75. During the reporting period, the Office examined several forms of alleged conduct and their possible legal qualifications under the Statute. In particular, the Office analysed and evaluated the information available to determine whether it provides a reasonable basis to believe that alleged crimes against actual or perceived opponents of the Government in the context of the anti-government protests and related political unrest from at least April 2017 amount to crimes against humanity under article 7 of the Statute. The conduct described below is without prejudice to the identification by the Office of any further alleged crimes, or alternative legal qualifications.

76. *Killings and injuries:* the vast majority of deaths related to the political crisis in Venezuela reportedly occurred in the context of protests during 2017 and 2019. In the context of protests of 1 April to 31 July 2017, at least 70 persons were reportedly killed by members of the security forces and/or pro-Government

armed civilians allegedly acting in sporadic coordination with the security forces. Thousands were also reportedly injured in the context of protests. Reports suggest that the security forces suffered 10 fatalities and a further 500 injuries. During the protests held between 21 and 25 January 2019, 30 to 47 individuals were reportedly killed by security forces and/or pro-government armed civilians acting in coordination with them, while 131 security officers were reportedly injured and one officer was reportedly killed. Some sources additionally alleged that members of the security forces carried out targeted killings of perceived opponents during house raids.

77. *Deprivation of liberty*: in the context of the 2017 protests, more than 5,000 individuals were reportedly detained by the authorities. Although many were released, the majority reportedly remained subject to criminal prosecutions or measures limiting their freedom, while hundreds were allegedly subjected to due process violations. This reportedly includes more than 700 civilians who were prosecuted by military courts. In 2018, a further 500 individuals were allegedly subjected to politically-motivated arrests, while between January and May 2019, a further 2,000 individuals were reportedly detained. Information regarding the lengths of these detentions was not generally available. Nonetheless, the UN High Commissioner for Human Rights reported that, as of 31 May 2019, 1,437 persons (detained since 2014) had been released unconditionally, 8,598 had been released conditionally pending criminal proceedings in their cases, and 793 remained arbitrarily deprived of their liberty. Based on information available, since 2014, of more than 15,000 persons arrested in the context of these events, at least 5,000 were allegedly detained for periods exceeding two weeks. The Office has also reviewed information related to alleged cases of enforced disappearance, concerning individuals reportedly taken into custody, but with respect to the whereabouts and fate of whom the authorities refused to provide information.

78. *Ill-treatment and torture*: estimates vary considerably with respect to the number of persons allegedly subjected to torture or other forms of ill-treatment in detention since 2017, ranging from 300 persons to up to 400. The alleged conduct was reportedly used to punish or force confessions and/or incrimination of others.

79. *Sexual and gender-based crimes:* information available suggests that incidents of alleged rape and other forms of sexual violence in the context of detention may be underreported due to social stigma for victims and other societal or cultural factors. In spite of the absence of overall estimates of the scale of this alleged conduct, multiple examples of sexual violence against both men and women in the context of detention have been documented by various sources.

80. *Alleged persecutory acts*: various sources further allege that the Venezuelan authorities implemented measures aimed at suppressing and punishing the expression of dissenting views, and targeted victims by reason of their actual or perceived political opposition to the Government.

OTP Activities

81. During the reporting period, the Office has almost concluded its subject-matter assessment. In particular, the Office has analysed multiple article 15 communications, together with publicly available material, including reports from Venezuelan and international civil society organisations and think-tanks, the UN Office of the High Commissioner for Human Rights ("OHCHR"), the UN Working Group on Arbitrary Detention, the Inter-American Commission on Human Rights and the Organization of American States ("OAS").

82. The Office has also continued engaging with multiple stakeholders and information providers in efforts to address relevant information gaps.

Conclusion and Next Steps

83. The Office expects to finalise its assessment of subject-matter jurisdiction in early 2020. Should the assessment result in a positive finding, the Office will proceed to an assessment of admissibility. The Office will also continue to record allegations of crimes to the extent that they may fall within the jurisdiction of the Court.

III. SITUATIONS UNDER PHASE 3 (ADMISSIBILITY)

COLOMBIA

Procedural History

84. The situation in Colombia has been under preliminary examination since June 2004. During the reporting period, the Office continued to receive communications pursuant to article 15 of the Rome Statute in relation to the situation in Colombia.

85. In November 2012, the OTP published an Interim Report on the Situation in Colombia, which summarised the Office's preliminary findings with respect to jurisdiction and admissibility.

Preliminary Jurisdictional Issues

86. Colombia deposited its instrument of ratification to the Statute on 5 August 2002. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Colombia or by its nationals from 1 November 2002 onwards. However, the Court may exercise jurisdiction over war crimes committed since 1 November 2009 only, in accordance with Colombia's declaration pursuant to article 124 of the Statute.

Contextual Background

87. Colombia experienced over 50 years of armed conflict between Government forces, paramilitary armed groups and rebel armed groups, as well as amongst those groups. The most significant actors included: the Revolutionary Armed Forces of Colombia – People's Army (*Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo*, "FARC-EP"), the National Liberation Army (*Ejército de Liberación Nacional*, "ELN"), paramilitary armed groups and the Colombian armed forces.

88. On 24 November 2016, the Government of Colombia and the FARC-EP signed the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace ("*Acuerdo Final Para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera*"). The agreement stipulates the setting-up of a Comprehensive System for Truth, Justice, Reparation and Non-Repetition, including the establishment of a Special Jurisdiction for Peace ("SJP") designed to investigate and punish serious conflict-related crimes and to bring perpetrators to account. On 15 March 2018, the SJP started its operations.

89. On 18 January 2019, the Colombian Government announced the end of peace talks with the ELN, following a deadly attack attributed to the guerrilla group against a police academy in Bogotá. Following the announcement, the Colombian authorities reactivated Interpol Red Notices against all ten members of the ELN delegation in Havana, where negotiations were being held since May 2018, and called on the Cuban authorities to arrest and extradite them to Colombia.

Subject-Matter Jurisdiction

90. As set out in previous reports, the Office has determined that the information available provides a reasonable basis to believe that crimes against humanity under article 7 of the Statute have been committed in the situation in Colombia by different actors, since 1 November 2002. These include murder under article 7(1)(a); forcible transfer of population under article 7(1)(d); imprisonment or other severe deprivation of physical liberty under article 7(1)(e); torture under article 7(1)(f); and rape and other forms of sexual violence under article 7(1)(g) of the Statute.

91. There is also a reasonable basis to believe that since 1 November 2009 war crimes under article 8 of the Statute have been committed in the context of the non-international armed conflict in Colombia, including murder under article 8(2)(c)(i); attacks against civilians under article 8(2)(e)(i); torture and cruel treatment under article 8(2)(c)(i); outrages upon personal dignity under article 8(2)(c))(ii); taking of hostages under article 8(2)(c)(iii); rape and other forms of sexual violence under article 8(2)(e)(vi); and conscripting, enlisting and using children to participate actively in hostilities under article 8(2)(e)(vii) of the Statute.[15]

Admissibility Assessment

92. The information assessed during the reporting period indicates that the Colombian authorities have taken meaningful steps to address conduct amounting to ICC crimes, as outlined in the 2012 Interim Report.[16] In this context, the OTP had identified the following potential cases that would form the focus of its preliminary examination: (i) proceedings relating to the promotion and expansion of paramilitary groups; (ii) proceedings relating to forced displacement; (iii) proceedings relating to sexual crimes; and, (iv) false positive cases. In addition, the OTP decided to: (v) follow-up on the Legal Framework for Peace and other relevant legislative developments, as well as jurisdictional aspects relating to the emergence of 'new illegal armed groups'.

[15] See ICC-OTP, Situation in Colombia, Interim Report, November 2012, paras. 30-153.
[16] See ICC-OTP, Situation in Colombia, Interim Report, November 2012, paras. 197-224.

93. During the reporting period, the Colombian authorities carried out a number of national proceedings relevant to the Office's admissibility assessment under the ordinary justice, the Justice and Peace Law ("JPL") and the SJP systems. In addition to other official documentation, the Attorney General's Office ("AGO") and SJP provided responses to OTP's requests for information relating to the status of national proceedings addressing "false positives" killings, sexual and gender-based crimes ("SGBC") and forced displacement, among other conduct. In addition, the authorities provided information relating to proceedings addressing the promotion and expansion of paramilitary and guerrilla groups. An overview of the status and steps taken in relation to these proceedings is provided below.

94. As of November 2019, 9,713 former members of the FARC-EP, 2,291 members of the armed forces and 63 State agents not members of the public forces had signed pledges of commitment ("*actas de sometimiento*") before the SJP. Further, the SJP has initiated seven "macro cases" relating to representative conflict-related crimes,[17] ruled on the participation of victims in proceedings before the Judicial Panel for Acknowledgement of Truth, Responsibility and Determination of Facts and Conduct ("Panel for Acknowledgement of Truth" or "Panel"), made several decisions relating to extradition requests and initiated non-compliance verification procedures for failure to uphold responsibilities under the peace agreement, including against former FARC-EP members who announced their rearmament in August 2019. As of October 2019, the SJP had received 214 reports relating to conflict-related crimes from victims' organisations, civil society members and State entities.

Proceedings relating to the promotion and expansion of paramilitary groups

95. During the reporting period, the Colombian authorities prioritised cases addressing conflict-related crimes committed by civilians and State agents non-combatants ("*terceros*") and have conducted steps to further national proceedings addressing conduct related to the promotion, and expansion of paramilitary groups.

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[17] The Judicial Panel for Acknowledgment of Truth, Responsibility and Determination of Facts and Conducts has prioritised the following "macro" cases for investigation:

- *Case No. 001*: Illegal retention of people by the FARC-EP,
- *Case No. 002*: Prioritizing the grave human rights situation in the municipalities of Tumaco, Ricaurte and Barbacoas, department of Nariño,
- *Case No. 003*: Deaths illegitimately presented as casualties during combat by agents of the State,
- *Case No. 004*: Prioritizing the grave human rights situation in the municipalities of Turbo, Apartadó, Carepa, Chigorodó, Mutatá, Dabeiba in the department of Antioquia, and El Carmen del Darién, Riosucio, Unguía y Acandí in the department of Choco,
- *Case No. 005*: Prioritizing the grave human rights situation in the municipalities of Santander de Quilichao, Suárez, Buenos Aires, Morales, Caloto, Corinto, Toribío y Caldono in the department Cauca,
- *Case No. 006*: Victimization of members of the *Unión Patriótica* (UP) by State agents, and
- *Case No. 007:* Recruitment and use of girls and boys in the armed conflict.

96. The information made available to the Office indicates that, until October 2019, the AGO was conducting a total of 2,047 cases against civilians or State agents not members of the public forces for crimes related to the promotion, support or financing of illegal armed groups. Of these, 1,253 cases reportedly relate to crimes allegedly committed by civilians or businessmen ("civil third parties") and 794 to State agents non-combatants.

97. The AGO further prioritised 29 representative cases involving 70 individuals pursuant to its plan for the investigation and prosecution of civil third parties and State agents linked to illegal armed groups ("*actores armados al margen de la ley*"). As of September 2019, one case had reportedly reached the sentencing phase after a plea agreement ("*sentencia anticipada*"), one case was at the formulation of charges prior to a plea agreement, one case was at the trial stage, eight cases were under investigation ("*instrucción*"), and 12 at the preliminary investigation stage. One case had been referred to the SJP.

98. Further, the AGO reportedly took some steps in relation to the cases relating to the promotion and expansion of paramilitary groups "*Arlex Hurtado*" and "*Bloque Calima*". During the reporting period, former executives and employees of the company Chiquita brands (Banadex and Banacol branches), accused by the AGO in August 2018 for the alleged agreement ("*concierto para delinquir*") to finance the paramilitary front "*Arlex Hurtado*", requested the annulment of the accusation. The Deputy Attorney General rejected the request and continued to pursue the accusation against 10 former employees after considering that there was sufficient evidence to call them for trial.

99. Further, in response to a request for additional information, the AGO explained that the investigation against individuals who reportedly participated in the creation, promotion and financing of the paramilitary group "*Bloque Calima*" in representation of the AUC commanders, Carlos and Vicente Castaño, focuses mainly on the criminal responsibility of some businessmen from the Valle del Cauca. As of October 2019, the AGO had ordered the preventive detention of two persons for their alleged agreement to commit criminal acts in an aggravated form ("*concierto para delinquir agravado*"). In addition, three persons had been linked to the case through statements rendered during questioning ("*indagatoria*") or statements of absent person ("*declaración de persona ausente*").

100. In addition to cases under the ordinary justice system, the SJP accepted requests from former State officials to participate in proceedings before the jurisdiction for conduct relating to the promotion of paramilitary groups. On 26 April 2019, the Panel for the Definition of Legal Situations accepted the request from former Congressman Mr David Char Navas, and ordered the transfer of his case to the Panel for Acknowledgement of Truth. Prior to his admission, the former Congressman faced proceedings for alleged links with paramilitary groups. The Panel granted conditional release ("*libertad transitoria, condicionada y anticipada*") to Char Navas after submitting his commitment to contribute to the truth. On 20 September 2019, the former Congressman reportedly admitted having had links

with the paramilitary bloc "*Norte del Frente José Pablo Díaz*" which operated in the department of Atlántico. A second hearing on contribution to the truth was held on 18 October 2019.

101. On 30 April 2019, the Panel for the Definition of Legal Situations accepted the request from former Congressman Mr Álvaro Ashton Giraldo to participate in proceedings before the SJP. Ashton Giraldo committed to provide information about crimes allegedly committed by paramilitary front "*José Pablo Díaz*" with financial means provided by him. He further committed to provide information about activities carried out by other State agents and businessmen to promote paramilitary groups between 2002 and 2010. In July 2019, the Panel granted conditional release to Ashton Giraldo subject to conditions such as his full contribution to the truth.

102. Additionally, during the reporting period, a former Mayor of Cucuta, Mr Ramiro Suárez Corzo, requested to appear before the SJP. The former Mayor had previously faced proceedings under the ordinary justice system for his alleged participation in two murders reportedly committed by paramilitaries in 2003. On 27 May 2019, the Panel for the Definition of Legal Situations accepted the request to appear before the SJP in relation to one of the murders. The Panel's decision is currently under appeal.

Proceedings relating to forced displacement

103. With regard to proceedings relating to forced displacement, the Colombian authorities appear to have progressed in the investigation and prosecution of cases relevant to the preliminary examination. During the reporting period, the JPL Tribunal of Bogotá convicted former paramilitary commander Iván Roberto Duque Gaviria (a.k.a. "Ernesto Baez") and 273 members of the paramilitary bloc "*Central Bolívar*" for various counts of conflict-related crimes, including forced displacement, committed in several departments of Colombia. Mid and low-level members of the paramilitary blocs *Suroeste Antioqueño, Héroes de Granada* and *Norte* were also convicted for various counts of forced displacement between 1998 and 2005.

104. On 25 and 26 July 2019, the AGO requested the arrest of ten ELN commanders, including five members of its Central Command ("COCE") and five of the *Guerra Nororiental* front, for 26 acts of forced displacement committed in the region of Catatumbo since March 2019. The AGO also prioritised the situation concerning crimes committed by the ELN and "*Los Pelusos*", a dissident armed group of the *Ejército Popular de Liberación* ("EPL"). The alleged crimes include murder and forced displacement committed by both groups in Catabumbo since March 2018.

105. The information available further indicates that proceedings relating to forced displacement before the SJP have made progress during the reporting period. As of October 2019, it is reported that Cases No. 002 and No. 005 reached the stage

of voluntary submissions, while Case No. 004 was at the investigation stage. The process of victims' accreditation was initiated for these three cases.

106. With respect to the Case No. 002, "Prioritizing the grave human rights situation in the municipalities of Tumaco, Ricaurte and Barbacoas, department of Nariño", the SJP's Panel for Acknowledgement of Truth completed the grouping and concentration phases. Following its decision to prioritise conflict-related crimes, including forced displacement, committed by FARC-EP members and military forces in Nariño between 1990 and 2016, the Panel has carried out a number of investigative steps. The Panel has namely: (i) conducted two visits to Nariño; (ii) gathered and collated information on human rights and international humanitarian law violations in a database; (iii) identified members of the FARC-EP and the armed forces for voluntary statements, and carried out a preliminary identification of the alleged most responsible perpetrators; (v) inspected 236 judicial files concerning investigations carried out under the ordinary justice system; (vi) identified victims eligible to participate in the proceedings; and (vii) convened hearings for the construction of the truth (*"diligencias de construcción dialógica de la verdad")* with individuals identified for voluntary statements.

107. Since March 2019, the Panel has reportedly called 18 members of the FARC-EP to provide 28 voluntary statements and is expected to call members of the armed forces for the same purpose. The Panel is further coordinating with indigenous and Afro-Colombian communities, peasant and women's organisations to facilitate their participation in the proceedings. As of November 2019, the Panel had received requests for accreditation from 5,000 families from 25 *veredas* in Tumaco and Ricaurte.

108. With respect to Case No. 004, "Prioritizing the grave human rights situation in the municipalities of Turbo, Apartadó, Carepa, Chigorodó, Mutatá, Dabeiba", the Panel has consolidated a database containing approximately 1,000 alleged crimes against the civilian population, including indigenous communities, as well as information about the alleged perpetrators and victims. As of October 2019, the Panel had convened hearings for the construction of the truth (*"diligencias colectivas de construcción de la verdad")* and received reports addressing conflict-related crimes, including forced displacement, from women and human rights organisations. The SJP preliminarily identified approximately 400 victims (collectives and individuals), although the total number of victims participating in the proceedings is to be established at a later stage. In addition, the Panel has identified 240 persons for voluntary statements.

109. On 12 March 2019, after receiving information from victims located in different parts of Cauca, the Panel expanded the territorial scope of Case No. 005, "Prioritizing the grave human rights situation in the municipalities of Santander de Quilichao, Suárez, Buenos Aires, Morales, Caloto, Corinto, Toribío and

Caldono in the department Cauca".[18] The Panel reportedly consolidated a database with information about 120 alleged perpetrators, from the former FARC-EP and the armed forces, for several crimes, including forced displacement. As of October 2019, the Panel had called 39 former FARC-EP members to provide voluntary submissions.

Proceedings relating to sexual and gender-based crimes

110. With regard to proceedings addressing SGBC, the Colombian authorities appear to have made some progress in the investigation and prosecution of cases relevant to the preliminary examination. With regard to the JPL system, the above noted conviction of former paramilitary commander Iván Roberto Duque Gaviria (a.k.a. "Ernesto Baez") and 273 members of the paramilitary bloc "*Central Bolívar*" include also a number of counts with respect to conflict-related SGBC, including sexual slavery, forced prostitution and rape committed in various departments of Colombia. In addition, the former paramilitary commander of the *Resistencia Tayrona* bloc, Hernán Giraldo Serna (a.k.a. "*El Taladro*"), was convicted for 31 counts of sexual violence, including against women and minors. Further, mid and low-level members of the paramilitary blocs *Suroeste Antioqueño* and *Héroes de Granada* were also convicted for conflict-related SGBC.

111. With regard to the 206 cases against 234 members of the armed forces reported by the AGO to the SJP in its report "Gender based violence by State agents" of August 2018, the AGO reported that the cases involved 281 victims. The conduct subject of the cases took place in 29 of 32 departments of Colombia, with 40% of them concentrated in the departments of Antioquia, Arauca, Norte de Santander and Tolima. According to the AGO, the analysis of data did not allow for the identification of patterns attributable to specific military or police units.

112. As of October 2019, 65 of the 206 cases were under preliminary investigation, 31 were under investigation ("*con imputación o apertura de instrucción*"), 19 were at the trial stage and convicting sentences had been issued in 14 cases against 28 members of the armed forces. The remaining 77 cases ended due to decisions to close investigations, whether provisional (as with "*archivos*" or "*inhibitorios*" under the previous Code of Criminal procedure), or final ("*preclusiones*", which have the effect of *res judicata*).[19]

[18] The Panel added to the case the municipalities of Jambaló, Miranda, Padilla y Puerto Tejada from the North of Cauca, and Candelaria, Florida, Jamundí, Palmira and Pradera, from the south of the Cauca valley.

[19] *Archivos* (formerly *inhibitorios*) and *preclusiones* generally result from the absence of one or more elements of the crime, but *preclusiones* also result from the expiration of the time limits to complete the investigation. The *archivo* (article 79, Code of Criminal Procedure) occurs before the proper investigation has begun, thus, during the pre-investigative phase called *indagación*; it can be ordered by the AGO. In contrast, the *preclusión* (article 332, Code of Criminal Procedure) takes place after the AGO has formally commenced the investigation, and can only be decreed by a judge.

113. On 11 March 2019, the Colombian Constitutional Court granted the request of the SJP Panel for Acknowledgment of Truth to receive information on conflict-related cases of SGBC, prioritised in the confidential annexes to its rulings Auto 092/2008, 098/2013 and Auto 009/2015. The cases contained therein were transmitted to the SJP to determine whether these cases warrant the opening of an investigation by this jurisdiction.

114. In relation to proceedings before the SJP, Cases No. 002, 004 and 005 have also progressed in their activities with respect to SGBC allegedly committed by both, members of the FARC-EP and of the armed forces, in the departments of Nariño, Urabá and Cauca. As of October 2019, the Panel for Acknowledgement of Truth had accredited 22 groups of victims involving 871 persons in relation to Case No. 002. One group of victims of sexual violence from Nariño was accredited in August 2019.

115. With regard to Case No. 004, the SJP reported that part of the population victimised were members of the indigenous and Afro-Colombian communities, labour unions and peasants, as well as several social and political movements, and other organisations. A high number of women and members of the lesbian, gay, bisexual, transgender and intersex (LGBTI) community were identified as victims of SGBC in the Urabá region. The information available indicates that 40 victims are undergoing the process of verification to be accredited as victims before the SJP.

116. In relation to Case No. 005, the Panel for Acknowledgement of Truth has reviewed 33 reports from victims and civil society organisations and over 300 case files from the ordinary justice system addressing crimes committed to members of the State forces. The alleged crimes include SGBC, forced displacement, and conduct allegedly committed by "third parties".

117. On 1 March 2019, the Panel for Acknowledgement of Truth issued an order (Auto No. 029) prioritising Case No. 007, regarding the "Recruitment and use of girls and boys in the armed conflict" committed from 1 January 1971 until 1 December 2016. The order was based on reports and information submitted by civil society organisations and State authorities, including the AGO. The material submitted includes information about minors under the age of 18 reportedly subjected to sexual slavery, planned and forced abortions, cruel punishments and other forms of violence, affecting in particular children from Afro-Colombian and indigenous communities.

118. The Panel for Acknowledgement of Truth has taken a number of steps during the initial phases of this case. These include the statistical, spatial and structural analysis of information related to the recruitment and the use of minors, with a focus on the degree of victimisation and the structural organisation of the FARC-EP. The analysis should assist in the identification of macro criminality patterns and attribution of responsibility. From the information available, the Panel

identified 8,839 victims, including 5,965 males, 2,848 females and 26 victims whose gender was not registered.

Proceedings relating to "false positives" cases

119. As set out in its previous reports, the Office had identified five potential cases relating to hundreds of "false positives" killings allegedly committed by members of brigades acting under five divisions of the Colombian armed forces in specific regions of the country between 2002 and 2009. Each potential case identified by the Office represents one division of the National Army and one or more brigades attached to it, namely: First Division (10th Brigade), Second Division (30th Brigade and 15th Mobil Brigade), Fourth Division (7th, 16th and 28th Brigades), Fifth Division (9th Brigade) and Seventh Division (4th, 11th and 14th Brigades).[20]

120. The information made available by the Colombian authorities indicates that national proceedings relating "false positives" killings allegedly committed by members of the military units identified by the OTP as potential cases likely to arise from an investigation into the situation in Colombia have continued over the reporting period.

121. As of October 2019, the AGO had reportedly conducted a total of 2,268 active cases[21] involving 3,876 victims of "false positive" killings, including cases initiated in earlier reporting periods. These cases concern conduct allegedly committed by members of 25 brigades within seven divisions of the Colombian Army, which have resulted overall in 10,742 persons being investigated and 1,740 persons being convicted.[22] According to the AGO, during the reporting period, 31 persons were convicted for "false positive" killings. Of these, 11 individuals were members of the military units identified by the Office as part of the potential cases likely to arise from an investigation into the situation.

122. During 2019, the AGO also provided additional information with respect to the potential cases identified by the Office. As explained by the AGO, in some instances, the reported figures differ from figures reported in 2018 due to updates of its information systems as well as procedural steps taken in a number of cases, such as decisions to close investigations, whether provisional (as with

[20] ICC-OTP, Report on Preliminary Examination Activities 2017, paras. 131-132.
[21] According to the AGO, active cases should be understood as "cases in which decisions that imply inactivity of the process have not been made." For example: decisions to close investigations, whether provisional (as with "*archivos*", or "*inhibitorios*"), or final ("*preclusiones*"), joinder of cases ("*conexidades*"), indictments ("*acusaciones*") and sentences.
[22] The AGO further reported that, in 2019, two imputations, 74 accusations and 342 procedural steps, including initiation of investigations ("*aperturas de instrucción*"), joinder of cases ("*conexiones*") and early agreements ("*preacuerdos*"), were carried out. The AGO noted that the activities judicial activities were conducted in accordance to the investigative dynamic generated by article 79(3)(j) of the Statutory Law of the Administration of Justice in the Special Jurisdiction for Peace (Law 1957 of 6 June 2019).

"*archivos*", or "*inhibitorios*"), or final ("*preclusiones*"), joinder of cases ("*conexidades*"), indictments ("*acusaciones*") and sentences.

- *Potential case 1*: concerning false positives killings allegedly committed by members of the First Division (10th Brigade) between 2004 and 2008 in the department of Cesar.

  According to the AGO, proceedings have been carried out against seven generals of the National Army in relation to "false positives" killings allegedly committed by members of the First Division. As of October 2019, the AGO was reportedly carrying out 73 cases against 495 members of the Division, including against 10 colonels and 11 majors. Of the 73 cases, 10 were at the preliminary investigation stage ("*indagación previa*"), 58 were at the investigation stage ("*con imputación o apertura de instrucción*") and five at the trial stage.

- *Potential case 2*: concerning false positives killings allegedly committed by members of the Second Division (30th Brigade and 15th Mobil Brigade) between 2002 and 2009 in the departments of Norte de Santander and Magdalena.

  According to the AGO, proceedings have been carried out against two generals in relation to "false positives" killings committed by members of the Second Division. As of October 2019, 138 cases were reportedly ongoing against 1,015 members of the Second Division, including against 56 colonels and 29 majors. Of the 138 cases, 8 were at the preliminary investigation stage (*"indagación previa"*), 124 were at the investigation stage ("*con imputación o apertura de instrucción*") and six at the trial stage. On 27 November 2018, six members of the armed forces were convicted and sentenced to 35 years of imprisonment for homicide of protected person, among other conduct.

- *Potential case 3:* concerning false positives killings allegedly committed by members of the Fourth Division (7th, 16th and 28th Brigades) between 2002 and 2008 in the departments of Meta, Casanare and Vichada.

  According to the AGO, proceedings have been carried out against one general for "false positives" incidents allegedly committed by members of the Fourth Division. As of October 2019, 264 cases were reportedly ongoing against 1,415 members of the Division, including against 74 colonels and 70 majors. Of the 264 cases, 64 were at the preliminary investigation stage ("*indagación previa*"), 196 were at the investigation stage ("*con imputación o apertura de instrucción*") and four at the trial stage. On 10 July 2019, five members of the armed forces were convicted and sentenced to 37 years of imprisonment for homicide of protected person, among other conduct.

- *Potential case 4:* concerning false positives killings allegedly committed by members of the Fifth Division (9th Brigade) between 2004 and 2008 in the department of Huila.

  According to the AGO, as of October 2019, the AGO was carrying out proceedings against two generals for alleged killings committed by members of the Fifth Division. As of October 2019, 83 cases were ongoing against 221 members of the Fifth Division, including against two colonels and six majors. Of the 83 cases, 77 were at the investigation stage ("*con imputación o apertura de instrucción*") and six at the trial stage.

- *Potential case 5:* concerning false positives killings allegedly committed by members of the Seventh Division (4th, 11th and 14th Brigades) between 2002 and 2008 in the departments of Antioquia and Cordoba.

  According to the AGO, proceedings have been carried out against eight generals in relation to killings allegedly committed by members of the Seventh Division. As of October 2019, 601 cases against 2,364 members of the Seventh Division were reportedly ongoing, including against 40 colonels and 27 majors. Of these, 494 were at the investigation stage ("*con imputación o apertura de instrucción*") and 34 at the trial stage.

123. In addition, the AGO indicated, without further specification, that as of October 2019, 14 of the 29 commanding officers who were reportedly in charge from 2002 to 2009 of the divisions and brigades identified by the Office were linked to 96 ongoing investigations. Sentences upon conviction have been issued against two commanders.

124. In relation to proceedings under the SJP, as of October 2019, the Panel for Acknowledgement of Truth had accredited 314 victims in relation to Case No. 003, "Deaths illegitimately presented as casualties during combat by agents of the State". The Panel had received 15 reports in relation to this case from State entities, non-governmental and victims' organisations.

125. On 28 May 2019, the Panel for Acknowledgement of Truth ruled on the manner in which victims can participate in the proceedings under Case No. 003. Victims have the right to participate in all phases of the proceedings before the Panel and accredited victims' representatives may attend and submit questions during hearings where members of the armed forces provide voluntary statements. Victims may participate under protective conditions. As of October 2019, 16 victims and eight organisations representing victims participated in voluntary statements hearings.

126. Based on information received from the AGO, victims' organisations and the Executive Secretary of the SJP, the Panel decided to focus on military units responsible for high numbers of false positives killings in six departments of Colombia, namely Antioquia, Cesar, Norte de Santander, Casanare, Meta and

Huila. As of October 2019, 119 members of the armed forces had provided 155 voluntary statements ("*versiones voluntarias*") related to events relevant to the assessment of facts, conduct and responsibility for killings illegitimately presented as deaths in combat. The individuals concerned included members of Artillery Battalion No 2 *"La Popa"*, 10th Brigade, First Division (department of Cesar); 15th Mobil Brigade and Infantry Battalion *No. 15 "Francisco de Paula Santander"*, 30th Brigade, Second Division (department of Norte de Santander); 16th Brigade, Fourth Division, (department of Casanare); Infantry Battalion No. 21*"Batalla del Pantano de Vargas"*, Fourth Division (department of Meta); Infantry Battalion No. 27 *"Magdalena"*, 9th Brigade, Fifth Division (department of Huila) and; Artillery Battalion No. 4 *"Jorge Eduardo Sánchez"*, 4th Brigade, First Division until 2005 and subsequently, Seventh Division (department of Antioquia).

127. On 17 October 2019, the Panel for Acknowledgement of Truth conducted a public hearing where victims provided their views about 31 voluntary statements provided by members of the 15th Mobil Brigade and Infantry Battalion *"Francisco de Paula Santander"* with respect to 69 false positives killings allegedly committed in Norte de Santander between 2007 and 2008. The hearing included voluntary statements relating to the alleged killings of 15 young men in the municipality of Soacha, Ocaña. Following the hearing, the Panel is expected to compare the information received over the course of voluntary statements with other material, including information gathered from State entities, human rights and victims' organisations; determine the facts and conducts committed; and call alleged perpetrators to recognise the truth and acknowledge responsibility.

128. During the reporting period, the of Panel for the Determination of Legal Situations held 11 hearings to sign pledges of commitment and to assess the conditionality regime of members of the armed forces involved in 264 cases of "false positives" killings, who voluntarily appeared before the SJP. After confirmation of their pledges of commitment, the cases were transferred to the Panel for Acknowledgement of Truth in furtherance of its assessment of Case No. 003.

OTP Activities

129. During the reporting period, the Office received relevant information from the Colombian authorities, gathered additional information on the areas of focus of the preliminary examination and held multiple meetings with State authorities, international organisations, international NGOs and Colombian civil society in The Hague and New York.

130. The Office reiterated on several occasions the Prosecutor's support for the peace process and the implementation of sound transitional justice measures in Colombia. In this context, on 20 February 2019, the Deputy Prosecutor delivered a statement with Radio W restating the Prosecutor's support for the SJP, as a key

transitional justice mechanism adopted to ensure accountability as part of the implementation of the peace agreement.

131. Further, the Prosecutor held various meetings with Colombian authorities, including with President H.E. Iván Duque, the Minister of Foreign Affairs, the High Presidential Counsellor for Stabilization and the former Attorney General. In the course of these meetings, the Prosecutor exchanged views with the Colombian authorities on several aspects relevant to the preliminary examination, including on matters relating to the status of national proceedings relevant to the Office's analysis as well as on legislative developments that could have an impact on proceedings addressing Rome Statute crimes. The Prosecutor expressed her continued support for the authorities' efforts to ensure justice to the victims in accordance with the peace agreement, as well as the principles, values and requirements of the Rome Statute.

Conclusion and Next Steps

132. The Colombian authorities appear to have made progress towards the fulfilment of their duty to investigate and prosecute conduct amounting to war crimes and crimes against humanity under the Rome Statute, and thereby also addressing the forms of conduct underlying the potential cases identified by the Office. During 2020, the Office will continue assessing the genuineness of the proceedings carried out under the ordinary justice system, the JPL tribunals and the SJP, as well as contextual and legislative developments that may impact the effective conduct of their operations. In this context, the OTP will closely follow individual proceedings that should arise from relevant "macro" cases under the SJP, as well as the identification of cases selected for further steps, including investigations and prosecutions.

133. Given the scale, complexity and long-term nature of the domestic proceedings being undertaken by the three national jurisdictions dealing with such conduct, the Office will also seek to conceptualise during 2020 the preparation of relevant benchmarks which could enable the Office to complete its preliminary examination, subject to the continued satisfaction of certain conditions, such as: the absence of manifest gaps in the scope of national proceedings or of factors vitiating their genuineness, and the imposition of effective penal sanctions that serve appropriate sentencing objectives of retribution, rehabilitation, restoration and deterrence. This would also be subject to the possibility for the Office to revisit its assessment in due course based on a change in circumstance. The Office will engage during 2020 in a series of consultations with the authorities and all other relevant stakeholders in this regard.

<u>GUINEA</u>

Procedural History

134. The situation in Guinea has been under preliminary examination since 14 October 2009. During the reporting period, the Office continued to receive communications pursuant to article 15 in relation to the situation in Guinea.

Preliminary Jurisdictional Issues

135. Guinea deposited its instrument of ratification to the Statute on 14 July 2003. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Guinea or by Guinean nationals from 1 October 2003 onwards.

Contextual Background

136. In December 2008, after the death of President Lansana Conté, who had ruled Guinea since 1984, Captain Moussa Dadis Camara led a group of army officers who seized power in a military coup. Moussa Dadis Camara became the Head of State, established a military junta, the *Conseil national pour la démocratie et le développement* ("CNDD"), and promised that the CNDD would hand over power to a civilian president upon the holding of presidential and parliamentary elections. However, subsequent statements that appeared to suggest that Captain Camara might run for president led to protests by the opposition and civil society groups. On 28 September 2009, the Independence Day of Guinea, an opposition gathering at the national stadium in Conakry was violently suppressed by the security forces, leading to what became known as the "28 September massacre."

Subject-Matter Jurisdiction

137. In October 2009, the United Nations established an international commission of inquiry ("UN Commission") to investigate the alleged gross human rights violations that took place on 28 September 2009 and, where possible, identify those responsible. In its final report of December 2009, the UN Commission confirmed that at least 156 persons were killed or disappeared, and at least 109 women were victims of rape and other forms of sexual violence, including sexual mutilations and sexual slavery. Cases of torture and cruel, inhuman or degrading treatment during arrests and arbitrary detentions, and attacks against civilians based on their perceived ethnic and/or political affiliation were also confirmed. The UN Commission considered that there was a strong presumption that crimes against humanity were committed and determined, where it could, possible individual responsibilities.

138. The *Commission nationale d'enquête indépendante* ("CNEI"), set up by the Guinean authorities, confirmed in its report issued in January 2010 that killings, rapes and

enforced disappearances took place, although in slightly lower numbers than documented by the UN Commission.

139. As set out in its previous reports, the Office has concluded that the information available provides a reasonable basis to believe that the following crimes against humanity were committed in the national stadium in Conakry on 28 September 2009 and in the immediate aftermath: murder under article 7(1)(a); imprisonment or other severe deprivation of liberty under article 7(1)(e); torture under article 7(1)(f); rape and other forms of sexual violence under article 7(1)(g); persecution under article 7(1)(h); and enforced disappearance of persons under article 7(1)(i) of the Rome Statute.

Admissibility Assessment

140. On 8 February 2010, in accordance with the recommendations of the reports of the UN Commission and of the CNEI, the General Prosecutor of the Conakry Appeals Court appointed three Guinean investigative judges ("panel of judges") to conduct a national investigation into the 28 September 2009 events, which was completed in December 2017. Since national proceedings have been ongoing, the Office's assessment has focussed on whether the national authorities are willing and able to conduct genuine investigations and prosecutions, including the question of whether there has been unjustified delay which in the circumstances is inconsistent with an intent to bring the persons concerned to justice.

Completion of the investigation phase

141. On 25 June 2019, the Supreme Court rejected the appeal in cassation ("*pourvoi en cassation*") lodged by a number of parties to the proceedings challenging parts of the panel of judges' closing orders decision referring the case to trial. After hearing the concerned parties' arguments, the Supreme Court ruled to uphold the decision of the Investigative Chamber ("*Chambre de contrôle de l'instruction*"), issued in May 2018, dismissing a series of appeals challenging the panel of judges' decision to requalify the mode of liability retained against the accused and drop charges against two indictees.

142. With no more legal remedies available to challenge the completion of the national investigation in December 2017, the Supreme Court's decision concludes the investigation phase of the 28 September 2009 events case.

Organisation of the trial

143. During the reporting period, the steering committee ("*comité de pilotage*") tasked with the logistical organisation of the 28 September 2009 events trial has yielded limited results in its endeavour. Since its inauguration on 1 June 2018, the committee has met on seven occasions, although its foundational decree provided that the committee members should hold regular sessions once a week.

144. In the past year, the steering committee met on 7 December 2018, 5 April and 14 August 2019. In these meetings, the committee members reportedly confirmed that the trial will take place within the premises of the Appeals Court of Conakry and devised an action plan to that effect.

145. On 26 August 2019, the new Guinean Minister of Justice (*ad interim*), Mohamed Lamine Fofana, appointed in May 2019 following the resignation of his predecessor Me Cheick Sako, adopted a ministerial ruling to reform the committee's structure and functioning, in order to expedite its decision-making process. The main reforms introduced include the creation of two subsidiary bodies within the committee's structure, namely: a Technical Follow-Up Committee (*"Comité technique de suivi"*) and a Management Unit (*"Unité de gestion du projet sur les atrocités, la responsabilité et la reconciliation – PARR")*. The new decree further provides for the committee to hold ordinary sessions every three months, instead of on a weekly basis. No working sessions have been scheduled since these reforms were introduced.

146. Despite the limited progress in the work of the steering committee, the Minister of Justice announced on 29 October 2019, during the OTP's visit to Conakry, that the trial will take place at the latest in June 2020. In this regard, while the announcement of a concrete time frame for the holding of the trial is an encouraging development, a number of key practical and logistical aspects are still pending, including the construction or adaptation of a courtroom to host the trial, the appointment and training of magistrates, and the setting-up of a communication and security plan for all the actors involved in the proceedings.

OTP Activities

147. During the reporting period, the Office has closely examined the work of the steering committee tasked with the logistic organisation of the trial and the implementation of its decisions. The Office has also assessed the impact of possible procedural and political factors that could potentially obstruct the holding of a trial or unjustifiably delay its organisation. In this respect, the Office has continued to encourage relevant stakeholders towards the organisation of the trial. In particular, the Office has remained in regular contact with the Guinean authorities, national and international civil society organisations and other international partners supporting the national authorities in their efforts to organise a fair and impartial trial. The Office has also continued liaising with international partners focussing on sexual and gender-based crimes, such as the UN Team of Experts on the Rule of Law and Sexual Violence in Conflict and its judicial expert deployed to support national proceedings.

148. In April and October 2019, the Office conducted its seventeenth and eighteenth missions to Conakry. During both missions, the Office held meetings with the former and the new Minister of Justice (*ad interim*), the General Prosecutor of the Conakry Appeals Court, members of the steering committee, civil society, victims' counsel and the diplomatic community in Conakry, including the Office

of the United Nations High Commissioner for Human Rights ("OHCHR"), the United Nations Development Programme ("UNDP") and the European Union ("EU"). The Office also continued to meet on multiple occasions with national civil society organisations and victims' representatives, which included a meeting between the Prosecutor and Guinean civil society representatives on the margins of the ASP in December 2018.

149. On 11 November 2019, the Prosecutor issued a public statement highlighting the Office's main findings during its visit to Conakry in October 2019 and commending the announcement of a concrete date for the commencement of the trial, but expressing her concern about the lack of progress made by the steering committee in the organisation of the trial. The statement also included an intended preventive aspect following reports of numerous episodes of violence in Guinea in October and November 2019, occurring mainly in the context of state repression of demonstrations against a possible amendment of the Guinean Constitution.[23]

Conclusion and Next Steps

150. Since its establishment in June 2018, the steering committee has yielded limited results in the organisation of the 28 September 2009 events trial. In seven working sessions held between June 2018 and August 2019, the committee members have reportedly decided on a number of practical issues and logistics, including holding the trial in the Appeals Court of Conakry and developing a comprehensive communication and security plan for the entire duration of proceedings, but no concrete and tangible steps have been adopted.

151. Despite limited progress in the committee's work, the Minister of Justice's announcement that the trial should start at the latest in June 2020 is the most salient development in recent months. Nonetheless, in order to meet this time frame, the Guinean authorities will need to proceed with the effective implementation of all basic material aspects for the holding of the trial without further delay. It will also be important for competent magistrates to be appointed and be equipped with the necessary capacity and skills on the various legal and procedural issues that may arise in the course of proceedings. In this regard, it remains vital that the current political context in Guinea, marked by episodes of violence and civil unrest, does not further delay proceedings.

152. In the upcoming months, the Office will closely examine the implementation of all the basic conditions for the organisation of the trial in June 2020. To this end, the Office will pursue its regular exchanges with the Guinean authorities to discuss all aspects of the organisation of the trial, and encourage, as appropriate, relevant national and international stakeholders towards the organisation of a trial. Based on the information gathered over the next reporting period, the

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[23] ICC-OTP, Statement of ICC Prosecutor, Fatou Bensouda, at the conclusion of her Office's mission to Conakry, Guinea, 11 November 2019.

Office will continue to conduct its admissibility assessment for the purpose of determining whether the ongoing national proceedings are vitiated by an unwillingness or inability to genuinely carry out the proceedings within a reasonable delay.

IRAQ/UK

Procedural History

153. The situation in Iraq/the United Kingdom ("UK") has been under preliminary examination since 13 May 2014. During the reporting period, the Office continued to receive communications pursuant to article 15 of the Statute in relation to the situation in Iraq/UK.

154. On 10 January 2014, the European Center for Constitutional and Human Rights ("ECCHR") together with Public Interest Lawyers ("PIL") submitted an article 15 communication alleging the responsibility of UK (or "British") officials for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008.

155. On 13 May 2014, the Prosecutor announced that the preliminary examination of the situation in Iraq, previously concluded in 2006, was re-opened following submission of further information on alleged crimes within the 10 January 2014 communication.

Preliminary Jurisdictional Issues

156. Iraq is not a State Party to the Statute and has not lodged a declaration under article 12(3) accepting the jurisdiction of the Court. In accordance with article 12(2)(b) of the Statute, acts on the territory of a non-State Party will fall within the jurisdiction of the Court only when the person accused of the crime is a national of a State that has accepted jurisdiction.

157. The UK deposited its instrument of ratification to the Statute on 4 October 2001. The ICC therefore has jurisdiction over Rome Statute crimes committed on UK territory or by UK nationals from 1 July 2002 onwards.

Contextual Background

158. On 20 March 2003, an armed conflict began between a United States ("US") and UK-led coalition, and Iraqi armed forces, with two rounds of air strikes followed by deployment of ground troops. On 7 April 2003, UK forces took control of Basra, and on 9 April, US forces took control of Baghdad, although sporadic fighting continued. On 16 April 2003, the Coalition Provisional Authority disestablished the Ba'ath Party of Iraq, resulting in the removal of Ba'ath leadership from positions of authority within Iraqi society.

159. On 8 May 2003, the US and UK Governments notified the President of the UN Security Council about their specific authorities, responsibilities, and obligations under applicable international law as Occupying Powers under unified command. The occupying States, acting through the Commander of Coalition Forces, created the Coalition Provisional Authority ("CPA") to act as a

"caretaker administration" with power, *inter alia*, to issue legislation until an Iraqi government could be established.

160. On 8 June 2004, the UN Security Council adopted Resolution 1546 stipulating that the occupation would end and the Interim Government of Iraq would assume full responsibility and authority for Iraq by 30 June 2004. This transfer of authority, however, took place two days earlier, on 28 June 2004, when the Interim Government, created by the Governing Council, assumed the control of Iraq and the CPA consequently ceased to exist. Thereafter, the Multinational Force-Iraq ("MNF-I"), including a large contingent from the UK, remained in Iraq pursuant to UN Security Council authorisation and the request of the Government of the Republic of Iraq. At the expiry of this mandate on 30 December 2008, foreign forces still present in Iraq remained with the consent of the Iraqi government.

161. UK military operations in Iraq between the start of the invasion on 20 March 2003 and the withdrawal of the last remaining British forces on 22 May 2011 were conducted under the codename Operation Telic ("Op TELIC").

Subject-Matter Jurisdiction

162. The crimes allegedly committed by the UK forces occurred in the context of an international armed conflict in Iraq from 20 March 2003 until 28 June 2004, and in the context of a non-international armed conflict from 28 June 2004 until 28 July 2009. The UK was a party to these armed conflicts over the entire period.

Alleged crimes committed against detainees in the custody of the UK

163. As set out in previous reports, the information available provides a reasonable basis to believe that in the period from 20 March 2003 through 28 July 2009 UK servicemen committed the following war crimes against persons in their custody in the context of armed conflicts in Iraq: wilful killing/murder (article 8(2)(a)(i)) or article 8(2)(c)(i)); torture and inhuman/cruel treatment (article 8(2)(a)(ii) or article 8(2)(c)(i)); outrages upon personal dignity (article 8(2)(b)(xxi) or article 8(2)(c)(ii)); rape and other forms of sexual violence (article 8(2)(b)(xxii) or article 8(2)(e)(vi)).[24]

Admissibility Assessment

Complementarity

164. During 2019, the Office has focussed on bringing its determination on the scope and genuineness of domestic proceedings to a conclusion.

[24] ICC-OTP, Report on Preliminary Examination Activities 2017, para. 194.

165. In terms of the first limb of the complementarity assessment (inaction), the information available indicates that the UK authorities have not remained inactive in relation to the allegations brought to the attention of the Office, but have initiated a number of criminal proceedings (involving pre-investigative assessment of claims, investigations, and a more limited number of prosecutions) in relation to the conduct of British armed forces in Iraq over a period of fifteen years. A number of other non-criminal proceedings have also brought to light facts that appear to have fed into relevant criminal inquiries.

166. Although much focus of such inquires appears to have centred on the role of physical perpetrators and their immediate supervisors, the Iraq Historic Allegations Team ("IHAT") appears to have also examined issues of pattern that might be evidence of systematic or systemic criminal behaviour and might give rise to responsibility at the command/superior level.

167. In this context, the Office has considered whether it would be correct to characterise as 'inaction' decisions taken by the IHAT and its successor, the Service Police Legacy Investigations ("SPLI") or the Service Prosecuting Authority ("SPA") to not proceed with certain allegations based on criteria developed internally or otherwise approved by the High Court. This relates to the manner in which claims were 'sifted' or filtered and the sufficiency of evidence test applied during the initial assessment, as part of the pre-investigation case assessment, or upon full investigation. Since such filtering assessments form part of the investigative and prosecutorial process, based on the facts presented, the Office considers that it is difficult to argue that the UK authorities had remained inactive in relation to such a claim. Instead, the assessment has focused on the genuineness of the assessments undertaken within the context of article 17(2) of the Statute.

168. With respect to broader allegations involving military command or civilian superior responsibility, the Office recalls its policy paper which identifies among relevant factors for assessing inactivity whether there is a "deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible; or other, more general issues related to the lack of political will or judicial capacity".[25] In this context, the UK authorities do not appear to have remained inactive in relation to broader allegations of systemic abuse or of military command or civilian superior responsibility given that systemic issues were one of the mandated focusses on IHAT's mandate from the start and such issues appear to have formed a specific focus of the IHAT's work. Indeed, the apparent lack of inquiries into systemic issues by IHAT was one of the criticisms by the High Court in 2013 at that time.[26] This reportedly led to a specific focus by IHAT on allegations displaying a 'Problem Profile', which sought "to bring together under one umbrella allegations which are on the face of it linked to each

[25] *Policy Paper on Preliminary Examinations*, ICC-OTP, November 2013, para.48.
[26] *R (Ali Zaki Mousa and others) v. Secretary of State for Defence No. 2,* [2013] EWHC 1412 (Admin), 24 May 2013, paras. 176-177 and 192-193.

other by e.g. the same personnel identified as being involved in a number of different and independent allegations of ill-treatment perhaps at the same facility over a particular period and under the supervision of the same commanding officer(s)".[27] As such, again, the Office's focus has been on the genuineness of such inquiries.

169. In terms of genuineness, during the reporting period the Office assessed, *inter alia*, the manner in which claims were 'sifted' or filtered and the sufficiency of evidentiary test applied, as well as additional filtering criteria adopted by IHAT, in consultation with the SPA, in the light of the findings of the *Al-Sweady* Inquiry and the Solicitors Disciplinary Tribunal Judgment against solicitor Phil Shiner (of Public Interest Lawyers or 'PIL').[28] In this respect, the Office has also taken note of the findings of the separate Solicitors Disciplinary Tribunal Judgment which found not proven the allegations against the firm Leigh Day and its solicitors Martyn Day, Sapna Malik, Anna Crowther,[29] upheld on appeal before the High Court.[30] Finally, the Office has examined to what extent issues concerning alleged systemic issues has been genuinely examined by IHAT/SPLI. In particular, it has sought to follow the progress of the 'Problem Profiles' cases.

170. In this respect, the Office has viewed with concern recently reported findings of a year-long investigative journalism inquiry conducted jointly by the Sunday Times and the BBC Panorama documentary programme which alleges, based on interviews with former IHAT investigators and army personnel, efforts to shield the conduct of British troops in Iraq and Afghanistan from criminal accountability. In particular, the reports allege that this has involved the intentional disregarding, falsification, and/or destruction of evidence as well as the impeding or prevention of certain investigative inquiries and the premature termination of cases.[31] Although the Office will have to independently assess the veracity of the underlying allegations, the reports appear on their face highly relevant to its assessment of the genuineness of national proceedings.

Gravity

171. During the reporting period, the Office has sought to finalise its gravity assessment, taking into consideration: (i) the gravity of the alleged crimes,

[27] Sir David Calvert-Smith, Review of the Iraq Historic Allegations Team, 15 September 2016, para.13.14.
[28] Solicitors Disciplinary Tribunal, *Case No. 11510-2016, SRA v Philip Joseph Shiner*, Judgement, 29 March 2017.
[29] Solicitors Disciplinary Tribunal, *Case No. 11502-2016, SRA v Day, Malik, Crowther and Leigh Day (A Firm)*, Judgement, 22 September 2017.
[30] *Solicitors Regulation Authority v Day & Ors*, [2018] EWHC 2726 (Admin), 19 October 2018.
[31] *The Sunday Times*, 'War crimes scandal: Army 'covered up torture and child murder' in the Middle East', 17 November 2019; BBC Panorama, 'War Crimes Scandal Exposed', aired 18 November 2019. See also earlier report in *The Guardian*, 'Why we may never know if British troops committed war crimes in Iraq', 7 June 2018.

including their scale, nature, manner of commission, and impact; and (ii) the persons or groups of persons most responsible for the alleged crimes committed. This assessment will also be revisited in the light of any additional findings made as a result of its inquiries outlined above.

OTP Activities

172. During the reporting period, the Office has sought to finalise its admissibility assessment. In so doing, the Office has maintained contact with relevant actors, including the UK authorities, who have continued to cooperate with the Office, and with article 15 senders. In this context, in July 2019, the Office received a new submission from the ECCHR, one of the two main senders of article 15 communications. The Office has also interacted with the UK authorities on issues related to the preliminary examination.

173. The Office has also followed the proposal in May 2019 by the former Defence Secretary, calling for "a statutory presumption against prosecution of current or former personnel for alleged offences committed outside the UK in the course of duty more than 10 years previously, and which have been the subject of a previous investigation". The initial proposal, which the Office understands was to govern both Northern Ireland and more recent conflicts such as in Afghanistan and Iraq, would stipulate that prosecutions in such circumstances should not be considered to be in the public interest, except in exceptional circumstances.[32]

174. The Office understands that the above proposal remains subject to public consultation and no white paper setting out the specific text of draft legislation has as yet been introduced. Nonetheless, were such domestic legislation to be adopted, the Office would need to consider its potential impact on the ability of the UK authorities to investigate and/or prosecute crimes allegedly committed by members of the British armed forces in Iraq, against the standards of inactivity and genuineness set out in article 17 of the Statute.

Conclusion

175. During the reporting period, the Office made significant progress towards finalising its assessment of the situation in Iraq/UK. At the same time, the Office has had to assess the impact of developments during the year. During 2020, the Office will seek to ascertain whether the allegations of a lack of genuineness can be substantiated in order to enable it to come to a final determination with respect to the preliminary examination as early as practically possible.

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[32] Penny Mordaunt, Secretary of State for Defence, *Legal Protections and Support for Armed Forces Personnel and Veterans: Written statement*, 21 May 2019, HCWS1575. See also House of Commons Defence Committee, *Drawing a line: Protecting veterans by a Statute of Limitations*, Seventeenth Report of Session 2017–19, Report, together with formal minutes relating to the report Ordered by the House of Commons to be printed 16 July 2019.

NIGERIA

Procedural History

176. The preliminary examination of the situation in Nigeria was announced on 18 November 2010. During the reporting period, the Office continued to receive communications pursuant to article 15 in relation to the situation in Nigeria.

177. On 5 August 2013, the Office published the Article 5 report on the Situation in Nigeria, presenting its preliminary findings on jurisdictional issues.[33]

178. On 12 November 2015, on the basis of an updated subject-matter assessment, the Office identified eight potential cases involving the commission of crimes against humanity and war crimes under articles 7 and 8 of the Statute that form the subject of the ongoing admissibility assessment, including six for conduct by Boko Haram and two for conduct by the Nigerian security forces ("NSF").[34]

Preliminary Jurisdictional Issues

179. Nigeria deposited its instrument of ratification to the Statute on 27 September 2001. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Nigeria or by its nationals from 1 July 2002 onwards.

Contextual Background

180. The non-international armed conflict between the NSF and Boko Haram in Nigeria continued during the reporting period. Initially formed as a Nigeria-centric, grass roots Islamist extremist organisation, Boko Haram has evolved into a militant movement of transnational proportions with factions allegedly affiliated with ISIS and al-Qaeda. Reportedly, at least three factions of what is jointly referred to as Boko Haram currently operate in Nigeria and the Lake Chad region bordering Niger, Chad, and Cameroon. These include the Boko Haram faction led by Abubakar Shekau, the Ansaru splinter group, and the ISIS-supported Islamic State West Africa Province ("ISWAP"). In particular the latter has increased its operations and influence in the Lake Chad region during the reporting period. ISWAP also reportedly replaced its leader Abu Musab Al-Barnawi with Abu Abdullahi Ibn Umar al-Barnawi in May 2019. With Boko Haram's ISWAP faction's increased attacks on security forces, the intensity of the hostilities between the NSF and Boko Haram factions has increased during the reporting period.[35] Military operations against Boko Haram in the North East

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[33] See ICC-OTP, Situation in Nigeria: Article 5 Report, 5 August 2013.
[34] See ICC-OTP, Report on Preliminary Examination Activities 2015, paras. 195-216.
[35] The Office acknowledges that the existence of different Boko Haram factions might eventually necessitate considering whether the situation should be more appropriately characterised as several parallel non-international armed conflicts between the NSF and the different armed groups.

of Nigeria continued under Operation Lafiya Dole. Boko Haram also launched further attacks against the civilian population and targeted humanitarian objects and personnel.

Subject-Matter Jurisdiction

181. The Office has examined information regarding a wide range of alleged crimes committed on the territory of Nigeria. The Office has been able to arrive at subject-matter determinations on the majority of allegations concerning crimes against humanity and war crimes allegedly committed by Boko Haram members and members of the NSF from 2009 until early 2019. According to findings previous published,[36] the Office found that there was a reasonable basis to believe that since 2009 members of Boko Haram had committed crimes against humanity of murder and persecution.[37] In 2015, the Office updated its subject-matter assessment, concluding that there was a reasonable basis to believe that between 1 January 2013 and 31 March 2015, both Boko Haram and the NSF committed crimes under the ICC's jurisdiction, including war crimes and crimes against humanity.[38]

182. During the reporting period, the Office has updated its subject-matter assessment to include alleged crimes occurring after March 2015.

183. In particular, in the light of the information assessed during the reporting period, there is a reasonable basis to believe that Boko Haram members have committed the war crime of attacks against personnel or objects involved in humanitarian assistance pursuant to article 8(2)(e)(iii) and the war crime of taking of hostages pursuant to article 8(2)(c)(iii) of the Statute. Boko Haram has reportedly carried out several attacks against humanitarian convoys and the personnel of different humanitarian organisations. In at least two incidents, the attacks were conducted against humanitarian aid convoys from an ambush which could indicate that the convoys were the intended target of the attacks. On 28 July 2016, a humanitarian convoy which included staff from United Nations Children's Fund ("UNICEF"), the United Nations Population Fund, and the International Organization for Migration ("IOM"), was reportedly ambushed by Boko Haram in Borno State. During the attack, one UNICEF employee and one IOM contractor were injured. On 16 December 2017, an attack was reportedly carried out by Boko Haram on an UN World Food Programme convoy carrying humanitarian supplies. Four civilians were reportedly killed in the attack and the aid items were destroyed.

184. On 1 March 2018, Boko Haram members reportedly attacked an IDP camp in Rann, Borno State and, among other alleged crimes, abducted three female

[36] ICC-OTP, Report on Preliminary Examination Activities 2018, paras. 220-226.
[37] ICC-OTP, Situation in Nigeria: Article 5 Report, 5 August 2013.
[38] For a more detailed overview see ICC-OTP, Report on Preliminary Examination Activities 2015, paras. 192-216; ICC-OTP, Report on Preliminary Examination Activities 2018, paras. 220-226.

health workers, two mid-wives of the International Committee of the Red Cross and a nurse working for UNICEF. Boko Haram demanded a ransom from the organisations and the Nigerian Government in order to release the victims. After the deadline for their demands had passed, at least two of the abducted health workers were executed by Boko Haram in September and October 2018.

185. With respect to the NSF, the information assessed during the reporting period provides a reasonable basis to believe that members of the Civilian Joint Task Force ("CJTF") committed the war crime of conscripting and enlisting children under the age of fifteen years into armed groups and using them to participate actively in hostilities pursuant to article 8(2)(e)(vii) of the Statute. The Office considers the CJTF to be a part of the NSF for at least part of the period under examination, following its analysis of the level of control of the Nigerian military over the CJTF and the participation of the CJTF in military operations. According to the United Nations Secretary-General's 2017 report on Children and Armed Conflict in Nigeria the CJTF recruited and used 228 children (209 boys and 19 girls) for military related activities in the period between November 2015 and December 2016 including children under the age of 15 years. In July 2016, 115 boys aged 12 to 17 years were identified as being recruited and used by the CJTF in Borno State. As of October 2018, a total of 1,469 children (1,175 boys and 294 girls) associated with the CJTF have been identified only within the city of Maiduguri, Borno State, according to UNICEF. Children across Borno State were reportedly used for intelligence-related purposes, search operations, night patrols, crowd control, and the manning of guard posts. During the initial emergence of the CJTF some children allegedly also participated in combat activities.

186. With respect to sexual and gender-based crimes and crimes committed against children, the Office previously found a reasonable basis to believe that Boko Haram's specific targeting of both females and males constitute acts of persecution on gender grounds under article 7(1)(h) of the Statute.[39] The information assessed during the reporting period indicates that Boko Haram specifically targeted victims based on gender and perceived traditional social role. Men and boys were often forced to join the armed group and to participate in hostilities, with those who refused being killed; while women and girls were often abducted and became victims of forced marriage, rape, sexual slavery and other forms of sexual violence. Girls were moreover specifically targeted by Boko Haram for attending public schools. Such gender separation rendered both females and males, and in particular children, vulnerable to both physical and psychological harm.

187. The Office has also found during the reporting period a reasonable basis for believing that members of the NSF persecuted on gender grounds military aged males suspected of being Boko Haram members or supporters.

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[39] ICC-OTP, Report on Preliminary Examination Activities 2018, paras. 225-226.

188. The Office has also examined article 15 communications with respect to allegations of crimes not related to the armed conflict between the NSF and Boko Haram. In particular, during the reporting period, the Office worked on finalising its assessment on subject-matter jurisdiction with respect to the events which took place in December 2015 in Zaria, Kaduna State, when members of the Islamic Movement of Nigeria ("IMN") reportedly clashed with the NSF.[40] In this context, the Office notes with deep concern allegations of ongoing evidence tampering and of the alleged destruction of evidence. Other allegations that the Office has been reviewing include allegations with respect to the conduct of the NSF against members of the Indigenous People of Biafra and communal violence in Nigeria's North Central and North East geographical zones.

Admissibility Assessment

189. Based on its subject-matter assessment the Office initially identified eight potential cases in 2015, six in relation to Boko Haram and two in relation to the NSF.[41] In the reporting period and based on its updated subject-matter assessment, two new potential cases were identified by the Office, one with respect to Boko Haram and one with respect to the NSF. The total number of potential cases identified was thus raised from eight to ten potential cases, seven for Boko Haram and three for the NSF:

1. Potential cases concerning members of Boko Haram:

i. Targeted attacks against the civilian population;
ii. Abductions and imprisonment of civilians;
iii. Attacks against education (including schools, teachers, and schoolchildren);
iv. Recruitment and use of children to participate in hostilities;
v. Attacks against girls and women;
vi. Attacks against buildings dedicated to religion;
vii. Attacks against personnel or objects involved in humanitarian assistance.

2. Potential cases concerning members of the Nigerian security forces:

viii. Killings, torture or ill-treatment of military aged males suspected to be Boko Haram members or supporters in northeast Nigeria;
ix. Attacks against the civilian population;
x. Recruitment and use of children under 15 to participate in hostilities (CJTF).

190. This admissibility assessment has been based on a comparison between the potential cases arising out of the situation in Nigeria as identified by the Office and the cases investigated by national authorities in Nigeria, according to the

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[40] ICC-OTP, Report on Preliminary Examination Activities 2017, para. 213.
[41] ICC-OTP, Report on Preliminary Examination Activities 2015, paras. 195-216.

information provided to the Office *inter alia* by the Nigerian authorities. The Office has been in regular contact with the Office of the Attorney-General of the Federation and Minister of Justice ("AGF") to understand the scope of extant domestic proceedings. The AGF has been the Office's main focal point for both ordinary and military proceedings.

191. The information available suggests while some investigation and/or prosecutorial steps have been or are being taken by the authorities to ascertain the criminal responsibility of suspected Boko Haram members, these appear limited in scope and depth.

192. With respect to allegations against members of the NSF, the information available similarly indicates only a limited number of proceedings have been conducted against members of the NSF.

193. During the reporting period, the Office has focussed on a number of apparent challenges facing the Nigerian authorities in their efforts to combat criminality and their impact on the Office's assessment under articles 17(2) and 17(3), including the absence of legislative provisions addressing certain categories of conduct; the persistence of the armed conflict; inadequate investigation files; an over-reliance on confession-based evidence; a lack of forensic evidence; limited cooperation between investigators and prosecutor at pre-investigation stages; logistical difficulties, inadequate security for counsels, and the challenges of converting military intelligence to admissible evidence.

OTP Activities

194. The Office has sought to finalise its factual and legal assessment of information received on alleged crimes and gathered additional information on relevant national proceedings conducted by the Nigerian authorities. It conducted two missions to Nigeria during the reporting period in relation to its admissibility assessment.

195. In October 2019, the Prosecutor conducted a two-day mission to Abuja, Nigeria. It was her fourth mission to this situation country. During her visit, the Prosecutor met with the Vice-President of Nigeria, H.E. Mr Yemi Osinbajo, to discuss the Nigerian Government's support for and cooperation with the preliminary examination of the situation in Nigeria. During her visit, the Nigerian Government assured the Prosecutor of Nigeria's commitment to the ICC and its cooperation with the Office's preliminary examination.

196. In October 2019, the Office held a fourth technical meeting with Nigerian authorities at the Ministry of Justice in Abuja to gather additional information on national proceedings conducted with respect to the ten potential cases identified and to review its findings to date.

197. The Office also continued to engage with international partners supporting the Nigerian judiciary's activity in relation to crimes that could fall under the jurisdiction of the ICC. This included the presentation of its preliminary findings to Nigerian prosecuting authorities in a workshop organised by a partner NGO in June 2019 and aimed at reinforcing Nigeria's capacity to address complex and serious crimes.

198. Throughout the reporting period, the Office maintained close contact with relevant partners and stakeholders in the situation in Nigeria, including international and Nigerian NGOs, communication senders, and diplomatic actors. In particular, the Office also continued liaising with international partners focussing on SGBC, such as the Office of the UN Special Representative on Sexual Violence in Conflict.

Conclusion and Next Steps

199. While the Nigerian authorities appear to have taken a number of steps towards ascertaining the criminal responsibility of alleged perpetrators, the investigative/prosecutorial activities undertaken to date in relation to both members of Boko Haram and of the NSF appear to have been limited both in their scope and depth. In particular, according to the information available, it does not appear that the authorities are investigating and/or prosecuting cases concerning substantially the same conduct or cases that are otherwise similar to those identified by the Office. To date, the repeated commitment of the Nigerian authorities to provide the Office with relevant information in this respect has not materialised. During 2020, the Office will continue to urge the Nigerian authorities to tangibly demonstrate that they are indeed fulfilling their primary responsibility to investigate and prosecute ICC crimes, in the absence of which the Office will need to come to its own determination with respect to the admissibility of the potential cases it has identified and on whether the requirements of article 15 have been met.

PALESTINE

Procedural History

200. The situation in Palestine has been under preliminary examination since 16 January 2015.[42] During the reporting period, the Office continued to receive communications pursuant to article 15 in relation to the situation in Palestine.

201. On 22 May 2018, the Office received a referral from the Government of the State of Palestine regarding the situation in Palestine since 13 June 2014 with no end date. In reference to articles 13(a) and 14 of the Statute, the State of Palestine requested the Prosecutor "to investigate, in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the court's jurisdiction, committed in all parts of the territory of the State of Palestine."[43]

202. On 24 May 2018, the Presidency of the Court assigned the Situation in Palestine to Pre-Trial Chamber I ("PTC I").[44]

203. On 13 July 2018, PTC I issued a decision concerning the establishment, by the Registry, of "a system of public information and outreach activities among the affected communities and particularly the victims of the situation in Palestine."[45]

Preliminary Jurisdictional Issues

204. On 1 January 2015, the State of Palestine lodged a declaration under article 12(3) of the Statute accepting the jurisdiction of the ICC over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014." On 2 January 2015, the Government of the State of Palestine acceded to the Statute by depositing its instrument of accession with the UN Secretary-General. The Statute entered into force for the State of Palestine on 1 April 2015.

Contextual Background

West Bank and East Jerusalem

205. In June 1967, an international armed conflict (the Six-Day War) broke out between Israel and neighbouring states, as a result of which Israel acquired control over a number of territories including the West Bank and East Jerusalem.

[42] ICC-OTP, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, 16 January 2015.
[43] Referral Pursuant to Article 13(a) and 14 of the Rome Statute, 15 May 2018, para.9. See also ICC-OTP, Statement by ICC Prosecutor, Mrs Fatou Bensouda, on the referral submitted by Palestine, 22 May 2018.
[44] Decision assigning the situation in the State of Palestine to Pre-Trial Chamber I, ICC-01/18-1, 24 May 2018.
[45] Decision on Information and Outreach for the Victims of the Situation, ICC-01/18-2, 13 July 2018.

Immediately after the end of the Six-Day War, Israel established a military administration in the West Bank, and adopted laws and orders effectively extending Israeli law, jurisdiction and administration over East Jerusalem. In November 1981, a separate Civilian Administration was established to "run all regional civil matters" in the West Bank. On 30 July 1980, the Knesset passed a 'Basic Law' by which it established the city of Jerusalem "complete and united" as the capital of Israel.

206. Since 1967, the information available suggests that the Israeli civilian presence in the West Bank and East Jerusalem has reportedly grown to nearly 600,000 settlers, living in 137 settlements officially recognised by the Israeli authorities, including 12 large Israeli 'neighbourhoods' in the eastern part of Jerusalem, and some 100 unauthorised settlements or 'outposts'.

207. Pursuant to the Oslo Accords of 1993-1995, the Palestine Liberation Organization and the State of Israel formally recognised each other, and agreed on a progressive handover of certain Palestinian-populated areas in the West Bank to the Palestinian National Authority (or Palestinian Authority, "PA"). Under the 1995 Interim Agreement, the West Bank was divided into three administrative areas (Area A – full civil and security control by the PA; Area B – Palestinian civil control and joint Israeli-Palestinian security control; Area C – full civil and security control by Israel).

208. The peace talks between the parties ground to a halt in 1995 and were followed over the years by a number of rounds of negotiations including the Camp David Summit of 2000, the 2002/2003 Road Map for Peace, as well as intermittent peace talks and related initiatives since 2007. To date, no final peace agreement has been reached and a number of issues remain unresolved, including the determination of borders, security, water rights, control of the city of Jerusalem, Israeli settlements in the West Bank, refugees, and Palestinians' freedom of movement.

Gaza

209. On 7 July 2014, Israel launched 'Operation Protective Edge', which lasted 51 days. According to the Israeli authorities, the objective of the operation was to disable the military capabilities of Hamas and other groups operating in Gaza, neutralise their network of cross-border tunnels and halt their rocket and mortar attacks against Israel. The operation consisted of three phases: after an initial phase focussed on air strikes, Israel launched a ground operation on 17 July 2014; a third phase from 5 August onwards was characterised by alternating ceasefires and aerial strikes. Several Palestinian armed groups ("PAGs") participated in the hostilities, most notably the respective armed wings of Hamas and the Palestinian Islamic Jihad as well as the al-Nasser Salah al-deen Brigades. The hostilities ended on 26 August 2014 when both sides agreed to an unconditional ceasefire.

210. Since the end of the 2014 hostilities, different national and international bodies have conducted inquiries and/or investigations into incidents that occurred during the 2014 Gaza conflict, such as, for example, the UN Independent Commission of Inquiry on the 2014 Gaza Conflict, the UN Headquarters Board of Inquiry into certain incidents that occurred in the Gaza Strip between 8 July 2014 and 26 August 2014, the Israel Defense Forces ("IDF") Military Advocate General ("MAG"), and the Palestinian Independent National Committee.

211. On 30 March 2018, the 42nd anniversary of the Palestinian Land Day, tens of thousands of Palestinians participated in a protest, dubbed the "Great March of Return", near the border fence between the Gaza Strip and Israel. The demonstrations were reportedly organised to draw attention to the Palestinians' demands for an end of the Israeli occupation and its blockade on the Gaza Strip and to the rights of refugees and their descendants to reclaim their ancestral lands in Israel. Although the protests were initially planned to last only six weeks, until 15 May 2018 ("Nakba Day"), they have ultimately continued during 2019.

212. In the context of these events, IDF soldiers have used non-lethal and lethal means against persons participating in the demonstrations, reportedly resulting in the killing of over 200 individuals, including over 40 children, and the wounding of thousands of others. Reportedly, journalists and medical workers have been among those killed and injured. Damage was also reportedly caused to a number of ambulances deployed during the protests.

213. While the majority of demonstrators reportedly engaged in non-violent protest and remained several hundred meters away from the border, some entered the immediate area of the border fence and engaged in violent acts, such as throwing rocks, Molotov cocktails and other explosive devices, deploying incendiary kites and balloons into Israel, and attempting to infiltrate into Israeli territory. The deployment of such incendiary kites and balloons has resulted in significant damage to Israeli agricultural and natural land and some Israeli property.

214. Israel has alleged that Hamas and armed groups in Gaza have sought to instigate a violent confrontation and have exploited the protests as a cover for acts of terrorism against the State of Israel, using the presence of civilians to shield their military activities. However, the IDF's rules of engagement and the alleged use of excessive and deadly force by Israeli forces in the context of the demonstrations has been heavily criticised by, among others, UN officials and bodies and a number of international and regional NGOs. In May 2018, the Israeli Supreme Court dismissed petitions challenging the rules of engagement purportedly applied by the IDF in the context of the demonstrations.

215. On 18 May 2018, the UN Human Rights Council adopted Resolution S-28/1 establishing an independent international commission of inquiry to investigate alleged violations and abuses of international humanitarian law and

international human rights law committed in the context of the demonstrations that began on 30 March 2018. The commission published a detailed report on its findings on 18 March 2019.

216. The IDF has also reportedly announced that it has conducted or is otherwise in the process of conducting its own examination and investigations of certain alleged incidents involving the shooting of demonstrators. According to media reports, one internal IDF probe into the deaths of 153 demonstrators was led by IDF Brigadier General Moti Baruch. In parallel, the Fact-Finding Assessment Mechanism of the IDF MAG has reportedly been carrying out examinations of incidents. In addition, criminal investigations were reportedly opened by the MAG in relation to the deaths of 11 demonstrators. On 28 October 2019, one such investigation led to the conviction of one IDF soldier in relation to the killing of a teenager who took part in the demonstrations on 13 July 2018.

217. During 2019, there was also a marked increase in periodic hostilities between Israel and PAGs operating in Gaza. For example, on 4-6 May 2019, PAGs fired hundreds of rockets and mortar shells from Gaza towards Israel, reportedly killing at least four civilians and injuring over one hundred others and causing damage to property. The IDF also launched strikes against over one hundred targets throughout Gaza. Such attacks reportedly primarily targeted PAG members and their infrastructure, though also reportedly caused several civilian casualties (including to minors), and damage in certain instances. On 6 May, a ceasefire was reached between the parties. Most recently, a new outbreak of violence occurred around mid-November 2019. During this period, following an IDF targeted strike against a senior Palestinian Islamic Jihad commander, PAGs fired over 400 rockets and mortars towards Israel from Gaza, causing tens of injuries and damage to civilian property in Israel. Israel also launched several airstrikes in the Gaza Strip purportedly against PAG targets, which resulted in the killing of over 30 Palestinian individuals (including reportedly members of PAGs and also a number of civilians including children), injuries to around 100 others, and damage to property. A ceasefire was reportedly reached on 14 November 2019, although some airstrikes by the IDF and launches of rockets by PAGs were recorded in the subsequent days.

Preconditions to the Exercise of the Court's Jurisdiction

218. As highlighted in previous years, the preliminary examination of the situation in Palestine has raised a number of unique challenges, such as in relation to exercise of territorial jurisdiction by the Court, the resolution of which is a pre-requisite before the Prosecutor can come to a determination under article 53(1)(a). In particular, the Office has considered the scope of the Court's jurisdiction as well as possible challenges thereto. During the reporting period, the Office has sought to finalise its position on the preconditions to the exercise of the Court's jurisdiction.

Subject-Matter Jurisdiction and Admissibility

219. The summary below is without prejudice to any future determinations by the Office regarding these or other related matters.

West Bank and East Jerusalem

220. The Office has focused its analysis on alleged war crimes committed in the West Bank, including East Jerusalem, since 13 June 2014. In this regard, the Office has collected information on and analysed various different types of alleged conduct, while particularly focusing on reported settlement-related activities engaged in by Israeli authorities that are alleged to amount to crimes under article 8 of the Statute. The Office has also carried out an admissibility assessment with respect to any potential cases identified. In the context of the complementarity assessment, the Office has, for example, examined certain domestic judicial proceedings in Israel, namely cases before, and decisions by, the Israeli High Court of Justice. Taking into account both quantitative and qualitative factors, the Office has also assessed whether any identified potential cases are of sufficient gravity to warrant an investigation.

221. During the reporting period, the Office has sought to finalise its subject-matter analysis of such alleged conduct as well as attendant admissibility assessments concerning complementarity and gravity, while continuing to receive and carefully review additional information provided by relevant actors.

222. The Office has also continued to receive information regarding other crimes allegedly committed by Israeli authorities in the West Bank, including East Jerusalem, which may fall under the purview of article 7 of the Statute on crimes against humanity. Specifically, these allegations relate to the crime of persecution, transfer and deportation of civilians, as well as the crime of apartheid. In addition, the Office has also received allegations that: (i) Palestinian security and intelligence services in the West Bank have committed the crime against humanity of torture and related acts against civilians held in detention centres under their control; and (ii) the PA have encouraged and provided financial incentives for the commission of violence through their provision of payments to the families of Palestinians who were involved, in particular, in carrying out attacks against Israeli citizens, and under the circumstances, the payment of such stipends may give rise to Rome Statute crimes. These as well as any other alleged crimes that may occur in the future require further assessment.

Gaza

223. The Office has primarily focused its analysis on crimes allegedly committed during the hostilities that took place in Gaza between 7 July and 26 August 2014. In this regard, the Office has analysed the respective alleged conduct of the IDF and PAGs during the conflict. In conducting the subject-matter analysis, the

Office particularly focused on a sample of illustrative incidents, out of the thousands documented by the Office and compiled in comprehensive databases. In this respect, the Office sought to: (i) select incidents which appear to be the most grave in terms of the alleged harm to civilians and damage to civilian objects and/or are representative of the main types of alleged conduct, and (ii) prioritise incidents for which there is a range of sources and sufficient information available to enable an objective and thorough analysis.

224. The Office has also carried out an admissibility assessment with respect to potential cases identified. With respect to crimes allegedly committed by members of the IDF, the Office has collected information on and evaluated relevant investigative activities at the national level within the IDF military justice system; with respect to crimes allegedly committed by PAGs, the Office has been unable to identify any relevant national proceedings. Taking into account both quantitative and qualitative factors, the Office has also assessed whether any of identified potential cases meet the gravity threshold required to warrant an investigation.

225. During the reporting period, the Office sought to finalise its subject-matter analysis of the above-mentioned alleged conduct as well as attendant admissibility assessments, while continuing to receive and carefully review additional information provided by relevant actors.

226. In addition to the above, the Office has also received and gathered information regarding other crimes allegedly committed by both sides in relation to the violence that has occurred in the context of the protests held along the Israel-Gaza border since 30 March 2018 and throughout 2019. The Office has collected pattern data concerning over 200 incidents which resulted in the death of demonstrators by live fire and other means used by the IDF, and analysed in greater detail several such incidents, which resulted in the death of children, medical workers, journalists and disabled individuals. The Office has also collected and analysed information on the use of incendiary kites and balloons by demonstrators and possibly members of PAGs and their impact on the Israeli territory and population. The Office has further noted allegations that members of PAGs made use of civilians as shields and of child soldiers during the demonstrations. These as well as any other alleged crimes that may occur in the future require further assessment.

OTP Activities

227. During the reporting period, the Office has worked towards bringing the preliminary examination to a conclusion in order to reach a decision under article 53(1).

228. Throughout the reporting period, the Office continued to engage and consult with relevant stakeholders, including officials of Palestine and Israel,

intergovernmental and non-governmental organisations, and members of civil society.

229. The Office also continued to closely monitor relevant developments in the region, and to assess new allegations and information available concerning the alleged commission of Rome Statute crimes and any related national proceedings. The Office has also followed with concern proposals advanced during the recent electoral process, to be tabled to the Knesset, for Israel to annex the Jordan Valley in the West Bank.

Conclusion and Next Steps

230. While the situation has been under preliminary examination for almost five years and has benefitted from meaningful and constructive engagement with both the Palestinian and Israeli authorities, as well as numerous other actors, which have helped deepen the Office's understanding and assessment of the situation, the Prosecutor also believes that it is time to take the necessary steps to bring the preliminary examination to a conclusion.

REPUBLIC OF THE PHILIPPINES

Procedural History

231. The situation in the Republic of the Philippines ("the Philippines") has been under preliminary examination since 8 February 2018. During the reporting period, the Office continued to receive communications pursuant to article 15 in relation to this situation.

232. On 13 October 2016, the Prosecutor issued a statement on the situation in the Philippines, expressing concern about the reports of alleged extrajudicial killings of purported drug dealers and users in the Philippines.[46] The Prosecutor also recalled that those who incite or engage in crimes within the jurisdiction of the Court are potentially liable to prosecution before the Court, and indicated that the Office would closely follow relevant developments in the Philippines.

233. On 8 February 2018, following a review of a number of communications and reports documenting alleged crimes, the Prosecutor opened a preliminary examination of the situation in the Philippines since at least 1 July 2016.[47]

Preliminary Jurisdictional Issues

234. The Philippines deposited its instrument of ratification to the Statute on 30 August 2011. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of the Philippines or by its nationals since 1 November 2011.

235. On 17 March 2018, the Government of the Philippines deposited a written notification of withdrawal from the Statute with the UN Secretary-General. In accordance with article 127, the withdrawal took effect on 17 March 2019. The Court retains jurisdiction over alleged crimes that have occurred on the territory of the Philippines during the period when it was a State Party to the Statute, namely from 1 November 2011 up to and including 16 March 2019. Furthermore, the exercise of the Court's jurisdiction (i.e. the investigation and prosecution of crimes committed up to and including 16 March 2019) is not subject to any time limit.

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[46] ICC-OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda concerning the situation in the Republic of the Philippines, 13 October 2016.
[47] ICC-OTP, Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela, 8 February 2018.

Contextual Background

236. From 1988-1998, 2001-2010 and 2013-2016, Mr Rodrigo Duterte served as Mayor of Davao City, one of the largest and most urban cities in the Philippines. Throughout his tenure as mayor, a central focus of his efforts was purportedly fighting crime and drug use. On different occasions, then-Mayor Duterte reportedly publicly supported and encouraged the killing of petty criminals and drug dealers in Davao City. During the mentioned period, it is reported that police officers in Davao City as well as the so-called Davao Death Squad carried out at least 1,000 killings in incidents that share a number of common features.

237. In 2016, Mr Duterte ran as a candidate for President of the Philippines. As part of his campaign platform, he promised to launch a war on crime and drugs, *inter alia*, through replicating the strategies he implemented in Davao City during his time as mayor. On 9 May 2016, Mr Duterte was elected President of the Philippines, and was sworn in on 30 June 2016. On 1 July 2016, the Philippine National Police ("PNP") launched a nationwide anti-drug campaign in line with President Duterte's pronouncement to eradicate illegal drugs during the first six months of his term. In the context of that campaign, PNP forces have reportedly conducted tens of thousands of operations to date which have reportedly resulted in the killing of thousands of alleged drug users and/or small-scale dealers. It is also reported that, since 1 July 2016, unidentified assailants have carried out thousands of attacks similarly targeting such individuals.

238. Since July 2016, President Duterte has repeatedly and publicly confirmed his commitment to the continuation of this anti-drug campaign. Other senior government and PNP officials have also reportedly made regular public statements in support of the operations and activities carried out pursuant to or in connection with the adopted anti-crime/drug policies.

239. The UN Secretary-General, UN bodies and experts, various States, international NGOs and national civil society representatives have expressed serious concern about the alleged extrajudicial killings and criticised statements by President Duterte which have been viewed as endorsing the killings and fostering an environment of impunity and violence. On 11 July 2019, the UN Human Rights Council adopted resolution 41/2, *inter alia*, (i) urging the Government of the Philippines to take all necessary measures to prevent extrajudicial killings, to carry out impartial investigations and to hold perpetrators accountable, and (ii) requesting the High Commissioner to prepare a comprehensive written report on the situation of human rights in the Philippines, to be presented at the forty-fourth session of the Human Rights Council. President Duterte has reportedly stated that he will not be intimidated by international reactions, including a possible future ICC trial, and that his campaign against drugs will continue to be unrelenting and brutal.

Subject-Matter Jurisdiction

240. In conducting its subject-matter assessment in relation to the situation in the Philippines, the Office has examined several forms of alleged conduct and considered the possible legal qualifications open to it under the Rome Statute. The Office has focused in particular on whether the alleged conduct amounts to crimes against humanity. The descriptions below are without prejudice to the identification by the Office of any further alleged crimes.

241. The preliminary examination has focused on crimes allegedly committed in the Philippines between 1 July 2016 and 16 March 2019 in the context of the so-called "war on drugs" ("WoD") campaign launched nationwide by the government to fight the sale and use of illegal drugs. In particular, it focuses on allegations that President Duterte and senior members of law enforcement agencies and other government bodies actively promoted and encouraged the killing of suspected or purported drug users and/or dealers, and in such context, members of law enforcement, including particularly the PNP, and unidentified assailants have carried out thousands of killings throughout the Philippines.

242. Based on the information available, since the launch of the anti-drug campaign on 1 July 2016, thousands of individuals have been killed purportedly for reasons related to their alleged involvement in the use or selling of drugs, or otherwise due to mistaken identity or inadvertently when perpetrators opened fire on their apparent intended targets. Reportedly, over 5,300 of these killings were committed in acknowledged anti-drug operations conducted by members of Philippine law enforcement or in related contexts (such as while in custody or detention). Philippine officials have consistently contended that such deaths occurred as a result of officers acting legitimately in self-defence in the context of violent, armed confrontations with suspects. However, such narrative has been challenged by others, who have contended that the use of lethal force was unnecessary and disproportionate under the circumstances, as to render the resulting killings essentially arbitrary or extrajudicial executions.

243. Thousands of killings were also reportedly carried out by unidentified assailants (sometimes referred to as 'vigilantes' or 'unknown gunmen'). According to the information available, authorities have often suggested that such killings are not related to the WoD, contending that they occurred in the context of love triangles or, alternatively, feuds or rivalries between drug gangs and criminal organisations. Nevertheless, other information available suggests that many of the reported killings by unidentified assailants took place in the context of, or in connection to, the government's anti-drug campaign. In this regard, it has also been alleged that some of these vigilante-style executions committed by private citizens or groups were planned, directed and/or coordinated by members of the PNP, and/or were actually committed by members of law enforcement who concealed their identity and took measures to make the killings appear to have instead been perpetrated by vigilantes.

244. In addition to killings, it has been alleged that some individuals have been subjected to serious ill-treatment and abuses prior to being killed by state actors and other unidentified assailants, such as after being arrested or abducted and while being held in custody prior their deaths. It has also been alleged that in several incidents, relatives (such as spouses, parents or children) of the victims witnessed the killings, thereby sustaining serious mental suffering. Further, it has been reported that in at least a few incidents, members of law enforcement raped women who were apparently targeted because of their personal relationships to individuals alleged to have been involved in drug activities.

245. Overall, reportedly, most of the victims of the alleged crimes in question were persons suspected or known, by authorities, to purportedly be involved in drug activities, that is, individuals allegedly involved in the production, use, or sale (either directly or in support of such activities) of illegal drugs, or in some cases, individuals otherwise considered to be associated with such persons. The majority of the victims have notably been from more impoverished areas and neighbourhoods, especially those within urban areas, such as in locations within the Metro Manila, Central Luzon, Central Visayas, and Calabarzon regions, among others. In addition, it has been reported that some public officials, including civil servants, politicians, mayors, deputy mayors and barangay-level officials, and current and former members of law enforcement were allegedly killed because of their purported links to the illegal drug trade. According to the information available, many of the persons targeted overall by the alleged acts had been included on drug watch lists compiled by national and/or local authorities, and some of those targeted also included persons who had previously 'surrendered' to the police in connection to Oplan Tokhang. In a number of cases, notably, the alleged acts were committed against children or otherwise affected them. For example, reportedly, a significant number of minors (ranging in age from a few months old to 17 years old) were victims of apparent WoD-related killings, and in this respect, were killed in a number of circumstances, including as direct targets, as a result of mistaken of identity or as collateral victims.

Admissibility Assessment

246. Following a thorough legal assessment of the information available, the Office has sought to finalise its analysis on the admissibility of potential cases arising from the situation. As set out in article 17(1) of the Statute, admissibility requires an assessment of complementarity and gravity.

247. Open source information indicates that a limited number of investigations and prosecutions have been initiated (and, in some cases, completed) at the national level in respect of direct perpetrators of certain criminal conduct that allegedly took place in the context of, or connection to, the WoD campaign. For example, Philippine government officials and bodies have provided sporadic public updates on the number of investigations conducted by various authorities into killings that occurred during law enforcement operations. The information

available also indicates that criminal charges have been laid in the Philippines against a number of individuals – typically low-level, physical perpetrators – with respect to some drug-related killings. Based on the information available, one WoD-related case has proceeded to judgment in the Philippines, that of three police officers who were convicted by the Caloocan City Regional Trial Court in November 2018 for the murder of 17-year-old Kian Delos Santos.

248. While in principle, only national investigations that are designed to result in criminal prosecutions can trigger the application of article 17(a)-(c) of the Statute, out of an abundance of caution the Office is also examining national developments which appear to fall outside the technical scope of the term 'national criminal investigations', including Senate Committee hearings into extrajudicial killings.

OTP Activities

249. During the reporting period, the Office sought to finalise its subject-matter analysis of such alleged conduct as well as attendant admissibility assessments concerning complementarity and gravity. It gathered, received, and analysed information from a wide range of sources. The Office reviewed hundreds of media and academic articles, reports, databases, legal submissions, primary documents, press releases and public statements by intergovernmental, governmental and non-governmental organisations, and other relevant sources, including such that was received through article 15 communications submitted directly to the Office. Consistent with standard practice, the Office has subjected such information to rigorous source evaluation, including an independent and thorough assessment of the reliability of sources and credibility of information received. In connection with this process, the Office has continued to take steps to verify the seriousness of information received and corroborate a number of relevant factual issues.

250. In the context of its assessment of subject-matter jurisdiction, the Office further examined particular features of the WoD campaign and implementation, independently documented and analysed relevant individual alleged incidents, and conducted an analysis of relevant patterns and trends. With respect to the legal assessment, the Office has analysed the information available to determine whether the alleged conduct of State actors and/or other individuals (such as vigilantes) amounts to the crimes against humanity of murder, torture, other inhumane acts or rape. Such analysis was conducted with a view to identifying potential cases likely to arise from any potential investigation into the situation and the persons or groups of persons who may bear the greatest responsibility for the identified alleged crimes.

251. In addition, the Office has gathered information relevant to the determinations on admissibility. For example, the Office has collected and assessed open source information on any relevant national proceedings being conducted by Philippine authorities. The Office has also monitored proceedings that appear to remain

ongoing and taken steps to obtain further information pertinent to the complementarity assessment.

252. Throughout the reporting period, the Office continued to engage and consult with relevant stakeholders in order to address a range of matters relevant to the preliminary examination and to seek further information to inform its assessment of the situation. For example, the Office held a number of meetings and was in contact with such stakeholders, including various civil society organisations.

253. The Office has also been following with concern reports of threats and other measures apparently taken against human rights defenders, including those who have criticised the WoD campaign. The Office will continue to closely monitor such reports, as well as other relevant developments in the Philippines.

Conclusion and Next Steps

254. During the reporting period, the Office significantly advanced its assessment of whether there is a reasonable basis to proceed under article 15(3) of the Statute. During 2020, the Office will aim to finalise the preliminary examination in order to enable the Prosecutor to reach a decision on whether to seek authorisation to open an investigation into the situation in the Philippines.

Ukraine

Procedural History

255. The situation in Ukraine has been under preliminary examination since 25 April 2014. During the reporting period, the Office continued to receive communications under article 15 of the Statute in relation to crimes alleged to have been committed since 21 November 2013.

256. On 17 April 2014, the Government of Ukraine lodged a declaration under article 12(3) of the Statute accepting the jurisdiction of the Court over alleged crimes committed on its territory from 21 November 2013 to 22 February 2014.

257. On 25 April 2014, in accordance with the Office's Policy Paper on Preliminary Examinations, the Prosecutor opened a preliminary examination of the situation in Ukraine relating to the so-called "Maidan events."[48]

258. On 8 September 2015, the Government of Ukraine lodged a second declaration under article 12(3) of the Statute accepting the exercise of jurisdiction of the ICC in relation to alleged crimes committed on its territory from 20 February 2014 onwards, with no end date. On 29 September, based on Ukraine's second declaration under article 12(3), the Prosecutor announced the extension of the preliminary examination of the situation in Ukraine to include alleged crimes occurring after 20 February 2014 in Crimea and eastern Ukraine.[49]

Preliminary Jurisdictional Issues

259. Ukraine is not a State Party to the Statute. However, pursuant to the two article 12(3) declarations lodged by the Government of Ukraine on 17 April 2014 and 8 September 2015 respectively, the Court may exercise jurisdiction over Rome Statute crimes committed on the territory of Ukraine from 21 November 2013 onwards.

Contextual Background

Maidan events

260. At the start of the events that are the subject of the Office's preliminary examination, the Government of Ukraine was dominated by the Party of Regions, led by the President of Ukraine at the time, Viktor Yanukovych. Mass protests that began on 21 November 2013 in the area of Independence Square (*Maidan Nezalezhnosti*) in Kyiv, prompted by the decision of the Ukrainian

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[48] ICC-OTP, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination in Ukraine, 25 April 2014.
[49] ICC-OTP, ICC Prosecutor extends preliminary examination of the situation in Ukraine following second article 12(3) declaration, 29 September 2015.

Government not to sign an Association Agreement with the European Union ("EU").

261. Violence occurred at several points over the following weeks in the context of the demonstrations, resulting in injuries both to protesters and members of the security forces, and deaths of some protesters. From 18-20 February violence escalated sharply and scores of people were killed and hundreds injured, mostly on the side of the protesters. On 21 February 2014, under EU mediation, President Yanukovych and opposition representatives agreed on a new government and scheduled the presidential election for May 2014. On 22 February 2014, the Ukrainian Parliament voted to remove President Yanukovych.

Crimea

262. From the last days of February 2014, protests against the new Ukrainian Government began to grow, notably in the eastern regions of the country and in Simferopol, the capital of the Autonomous Republic of Crimea. From the night of 26-27 February 2014, armed and mostly uniformed individuals, whom the Russian Federation later acknowledged to be its military personnel together with locally-resident militia members, progressively took control of the Crimean peninsula. On 18 March the Russian Federation announced the formal incorporation of Crimea into Russian territory. Russia has continued to exercise effective control over the territory since that time.

Eastern Ukraine

263. From late February 2014 onwards, in parallel to events in Crimea, protests against the new Government took place in other regions of Ukraine, most notably in the east of the country, and armed persons took control of key government buildings in several eastern provinces. The situation deteriorated rapidly into violence: on 15 April 2014, the Ukrainian Government announced the start of an "anti-terror operation" in the east and by the end of April, the acting Ukrainian President announced that the Government was no longer in full control of the provinces of Donetsk and Luhansk, declared that the country was on "full combat alert", and reinstated conscription to the armed forces. On 2 May 2014, 40 people were killed in Odessa when a fire started inside a building in which pro-federalism (anti-government) protesters had taken refuge from counter protesters.

264. Following "referendums" held on 11 May 2014 that were deemed illegitimate by the Ukrainian Government, representatives of the self-proclaimed "Donetsk and Luhansk People's Republics" ("DPR"/"LPR") declared the regions' "independence" from Ukraine.

265. Armed conflict, involving the persistent use of heavy military weaponry by both sides, including in built-up areas, has since persisted in eastern Ukraine for more

than five years, in spite of international attempts to end the fighting. The highest numbers of casualties were recorded in the first year of the conflict, prior to the implementation of the Minsk II ceasefire agreement, signed in February 2015, though casualties have continued to occur, including as a result of shelling and light-arms fire.

266. In its *Report on Preliminary Examination Activities 2016*, the Office assessed that by 30 April 2014, the intensity of hostilities between Ukrainian government forces and anti-government armed elements in eastern Ukraine had reached a level that would trigger the application of the law of armed conflict and that the armed groups operating in eastern Ukraine, including the LPR and DPR, were sufficiently organised to qualify as parties to a non-international armed conflict. The Office also assessed that direct military engagement between the respective armed forces of the Russian Federation and Ukraine, indicated the existence of an international armed conflict in eastern Ukraine from 14 July 2014 at the latest, in parallel to the non-international armed conflict.

Subject-Matter Jurisdiction

267. In early 2019 the Office completed its preliminary analysis of subject-matter jurisdiction and assessed that there was a reasonable basis to believe that a number of crimes under the Statute had been committed both in the context of the situations in Crimea and in eastern Ukraine. In conducting this analysis, the Office examined several forms of alleged conduct and considered the various possible legal qualifications under the Statute.

268. In this regard, the Office encountered certain specific challenges in relation to the availability of certain information; while the information available in relation to alleged crimes was voluminous, it was sometimes lacking in its comprehensiveness and detail, in particular in relation the specific circumstances of alleged attacks in the context of conduct of hostilities, and in relation to the overall scale of detention related alleged crimes, especially in relation to non-government controlled areas in eastern Ukraine. These challenges relate in large part to the context of occupation in Crimea, and the ongoing hostilities in eastern Ukraine, which hindered access to the respective regions (and to relevant sites, witnesses and victims) by both Ukrainian and international organisations seeking to document alleged violations of human rights and international humanitarian law.

269. The conclusions of the Office’s preliminary assessment of subject matter jurisdiction are given below, without prejudice to the identification by the Office of any further alleged crimes, or alternative legal qualifications or factual determinations regarding the alleged conduct.

Crimea

270. In 2016, the Office made public its assessment that the situation within the territory of Crimea and Sevastopol would amount to an international armed conflict between Ukraine and the Russian Federation which began at the latest on 26 February 2014, and that the law of international armed conflict would continue to apply after 18 March 2014, the date on which Russia announced the incorporation of Crimea into the Russian Federation, to the extent that the situation within the territory of Crimea and Sevastopol factually amounts to an ongoing state of occupation.[50] This assessment, while preliminary in nature, provided the legal framework for the Office's analysis of information concerning crimes alleged to have occurred in the context of the situation in Crimea since 20 February 2014.

271. For purposes of the subject-matter assessment, the Office examined a large volume of information regarding a number of allegations of crimes that occurred in the context of the situation that led up to the occupation, and during the occupation of the territory of Crimea.

272. The information available provides a reasonable basis to believe that, from 26 February 2014 onwards, in the period leading up to, and/or in the context of the occupation of the territory of Crimea, the following crimes were committed: wilful killing, pursuant to article 8(2)(a)(i); torture, pursuant to article 8(2)(a)(ii); outrages upon personal dignity, pursuant to article 8(2)(b)(xxi); unlawful confinement, pursuant to article 8(2)(a)(vii); compelling protected persons to serve in the forces of a hostile Power, pursuant to article 8(2)(a)(v); wilfully depriving protected persons of the rights of fair and regular trial, pursuant to article 8(2)(a)(vi); the transfer of parts of the population of the occupied territory outside this territory (with regard to the transfer of detainees in criminal proceedings and prisoners), pursuant to article 8(2)(b)(viii); seizing the enemy's property that is not imperatively demanded by the necessities of war, with regard to private and cultural property, pursuant to article 8(2)(b)(xiii) of the Statute.

273. In addition, the Office considered the information available with regard to alleged offences under article 7 of the Statute, and found a reasonable basis to believe that acts amounting to crimes had occurred in the context of the period leading up to and during the (ongoing) occupation of Crimea: murder, pursuant to article 7(1)(a); deportation or forcible transfer of population (with regard to the transfer of detainees in criminal proceedings and prisoners), pursuant to article 7(1)(d); imprisonment or other severe deprivation of physical liberty, pursuant to article 7(1)(e); torture, pursuant to article 7(1)(f); persecution against any identifiable group or collectivity on political grounds, pursuant to article 7(1)(h); and enforced disappearance of persons, pursuant to article 7(1)(j) of the Statute.

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[50] See Report on Preliminary Examination Activities 2016, para. 158.

Eastern Ukraine

274. Between April 2014 and August 2019, the Office of the High Commissioner for Human Rights recorded 3,339 conflict-related civilian deaths in eastern Ukraine, including at least 147 children, 1,053 women, and 1,804 men. In the same period, more than 7,000 civilians were reportedly injured. Most civilian deaths – particularly in the first two years of the conflict – reportedly resulted from the shelling of populated areas in both government-controlled territory and areas controlled by armed groups with smaller numbers allegedly killed or injured by mines, explosive remnants of war, booby traps, improvised explosive devices, and firearms.

275. In addition to extensive loss of life and life-altering injuries, the use of heavy weaponry by all parties to the conflict has reportedly caused widespread damage and destruction of civilian infrastructure, residential property, hospitals and other medical facilities, schools and kindergartens in both government-controlled territory and areas controlled by armed groups. The impact on children has been particularly acute. Restrictions on movement as a result of the fighting, and exacerbated conditions of poverty have resulted in higher levels of malnutrition and affected children's physical and psychological development. In early 2016, UNICEF reported that one in five schools in Donbas had been damaged or destroyed, obliging children to travel greater distances to continue their schooling, putting them at even greater risk from shelling and other conflict-related harm.

276. The Office recorded more than 1,200 incidents involving crimes allegedly committed since 20 February 2014 in the context of events in eastern Ukraine. Although the highest numbers of incidents occurred in 2014 and 2015, during the most intense phase of hostilities, alleged crimes continue to be committed up to the present time.

277. For the purpose of determining whether the otherwise non-international armed conflict involving Ukrainian armed forces and anti-government armed groups could in fact be international in character, the Office considered information that suggests that the Russian Federation may have exercised overall control over armed groups in eastern Ukraine for some or all of the armed conflict. The existence of a single international armed conflict in eastern Ukraine would entail the application of articles of the Statute relevant to armed conflict of an international character for the relevant period. Taking into account these possible alternative classifications of the armed conflict(s) in eastern Ukraine, the Office considered the provisions of the Rome Statute applicable in both international and non-international armed conflict in conducting its analysis of the alleged crimes committed by the different parties to the conflict.

278. In its analysis of subject-matter jurisdiction with regard to eastern Ukraine, the Office examined a sample of specific attacks in the context of conduct of

hostilities, by both sides in the conflict. It also examined information available regarding conflict-related detention, including allegations of arbitrary detention, summary executions of persons *hors de combat,* ill-treatment, torture, rape and other forms of sexual violence. The information available at this stage suggests in particular that members of armed anti-government entities have generally committed detention-related alleged crimes of a more severe nature and on a significantly larger scale than members of Ukrainian Government Forces. As noted above, however, the current availability of information in relation to certain conduct appears to have been generally impacted by the challenges that organisations documenting human rights violations have encountered in collecting information relating to these events. This includes factors such as the general level of insecurity, denial of access to detainees, and concerns for the safety of witnesses and victims. This in turn may have impacted the availability of information regarding certain alleged crimes, both in public reports and communications provided to the Office.

279. Based on its preliminary assessment of subject-matter jurisdiction, the Office has concluded that the information available provides a reasonable basis to believe that, in the period from 30 April 2014 onwards, at least the following war crimes were committed in the context of the armed conflict in eastern Ukraine: intentionally directing attacks against civilians and civilian objects, pursuant to article 8(2)(b)(i)-(ii) or 8(2)(e)(i); intentionally directing attacks against protected buildings, pursuant to article 8(2)(b)(ix) or 8(2)(iv); wilful killing/murder, pursuant to article 8(2)(a)(i) or article 8(2)(c)(i); torture and inhuman/cruel treatment, pursuant to article 8(2)(a)(ii) or article 8(2)(c)(i)); outrages upon personal dignity, pursuant to article 8(2)(b)(xxi) or article 8(2)(c)(ii); rape and other forms of sexual violence, pursuant to article 8(2)(b)(xxii) or article 8(2)(e)(vi) of the Statute..

280. In addition, if the conflict was international in character, there is a reasonable basis to believe that the following war crimes were committed: intentionally launching attacks that resulted in harm to civilians and civilian objects that was clearly excessive in relation to the military advantage anticipated (disproportionate attacks), pursuant to article 8(2)(b)(iv); and unlawful confinement, pursuant to article 8(2)(a)(vii) of the Statute.

Admissibility

281. In 2019, the Office moved the focus of its preliminary examination of the situation in Ukraine to the assessment of admissibility. Since 2014 national investigative and prosecutorial authorities in Ukraine, and in other states, have initiated investigations and prosecutions of relevance to ICC jurisdiction. These proceedings include cases against persons holding senior or command-level positions in relation to the potential cases that would likely be the focus of any investigation by the Office. These proceedings are being, or have been conducted, by several different investigative and prosecutorial bodies in Ukraine and in other states. The Office has conducted an initial "mapping" of relevant

proceedings and identified the existence of multiple and overlapping jurisdictions with regard to conduct of relevance to ICC jurisdiction.

Crimea

282. Authorities overseeing, or conducting the investigation or prosecution of, relevant alleged crimes in Crimea, include the Ukrainian National Police, the State Bureau of Investigation ("SBI"), the Security Service of Ukraine ("SBU"), the Prosecutor General's Office (including the Military Prosecutor's Office), and the Prosecutor's Office of the Autonomous Republic of Crimea.

283. In relation to Crimea, the Office has identified multiple existing criminal proceedings being conducted by the aforementioned authorities, including conduct and persons that would likely be the focus of any investigation of crimes allegedly committed in Crimea. In relation to these relevant proceedings identified, the Office is currently seeking further information for purposes of assessing whether the specific conduct that is the focus of these national proceedings is the same as that identified in the potential cases identified by the Office.

Eastern Ukraine

284. In relation to eastern Ukraine, the information available to the Office indicates that relevant Ukrainian authorities have carried out a number of criminal proceedings against both members of Ukrainian Government Forces and members of the armed anti-government entities, including in relation to: instances of shelling and other alleged crimes related to the conduct of hostilities; summary executions and other killings in detention; torture; ill-treatment; rape and other forms of sexual violence; forcible disappearances; and arbitrary detention. In relation to these relevant proceedings identified, the Office is currently seeking further information for purposes of assessing whether the specific conduct that is the focus of these national proceedings is the same as that identified in the potential cases identified by the Office.

285. For purposes of the admissibility assessment, the Office is also considering whether, based on the information available, the crimes allegedly committed in eastern Ukraine and in Crimea respectively are sufficiently grave within the meaning and requirements of the Statute to justify the opening of an investigation, in particular considering their scale, nature, manner of commission, and their impact on victims and affected communities.

OTP Activities

286. During the reporting period, the Office continued to receive, collect and review information from a variety of sources to conduct a preliminary "mapping" of the different investigative and prosecutorial authorities conducting investigations and proceedings relevant to the potential cases that would likely be the focus of

any investigation. In this regard, the Office held a number of meetings with stakeholders both at the seat of the Court and during a mission to Ukraine in June 2019, to discuss existing proceedings and a range of issues of other relevance to the preliminary examination. During its June mission to Ukraine, the Office communicated to the Ukrainian authorities and civil society stakeholders, its preliminary findings in relation to alleged crimes in eastern Ukraine and Crimea, and discussed with them the (phase 3) assessment of admissibility, and additional information of relevance to the Office's analysis in that regard.

287. The Office has also reviewed additional information related to the period specified in Ukraine's first declaration under article 12(3) of the Statute and is conducting a thorough legal assessment of the information to determine whether it would alter the previous assessment of the alleged crimes that occurred in the context of the Maidan events. It is recalled that, in 2015, the Office considered that there was insufficient information at that stage to support the conclusion that the alleged attack carried out in the context of the Maidan protests was either widespread or systematic. The review of additional information includes the consideration of seven additional article 15 communications received since the original findings were made public.

Conclusion and Next Steps

288. During 2020, the Office will seek to finalise its assessment of the admissibility of potential cases that would likely be the focus of any investigation, both in relation to Crimea and eastern Ukraine, in order to enable the Prosecutor to come to a determination under article 15(3) of the Statute. In this regard, the Office is gathering additional information on relevant national proceedings and engaging with the Ukrainian authorities, civil society and other relevant stakeholders. Given the open-ended nature of Ukraine's acceptance of ICC jurisdiction, the Office will also continue to consider allegations of new crimes committed in Ukraine.

IV. COMPLETED PRELIMINARY EXAMINATIONS

BANGLADESH/MYANMAR

289. The preliminary examination into the situation in the People's Republic of Bangladesh ("Bangladesh")/Republic of the Union of Myanmar ("Myanmar") was opened on 18 September 2018. On 9 April 2018, the Office filed a Request pursuant to regulation 46(3) of the Regulations of the Court and article 19(3) of the Rome Statute, seeking a ruling from the Pre-Trial Chamber on the question of whether the Court may exercise jurisdiction pursuant to article 12(2)(a) of the Statute over the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh.[51] Myanmar is not a State Party to the Statute, but Bangladesh is.

290. On 6 September 2018, Pre-Trial Chamber I issued a decision confirming that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh, as well as potentially other crimes under the Rome Statute.[52] Specifically, the Pre-Trial Chamber found that the Court may exercise jurisdiction over "acts of deportation initiated in a State not Party to the Statute (through expulsion or other coercive acts) and completed in a State Party to the Statute (by virtue of victims crossing the border to a State)",[53] as well as potentially other crimes under the Statute "[i]f it were established that at least an element of another crime within the jurisdiction of the Court […] is committed on the territory of a State Party".[54]

291. On 18 September 2018, the Prosecutor issued a statement announcing that the Office would proceed to the next phase of the preliminary examination process and carry out a full-fledged preliminary examination into the situation in Bangladesh/Myanmar.[55] The preliminary examination focused on crimes in respect of which one element was committed on the territory of a State Party to the Statute – in this case, Bangladesh.

292. During the reporting period, the Office completed its comprehensive assessment of statutory criteria for a determination of whether there is a reasonable basis to proceed with an investigation into the situation in Bangladesh/Myanmar pursuant to article 53(1) of the Statute.

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[51] Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 9 April 2018.
[52] Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, paras. 73-74.
[53] Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, para. 73.
[54] Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, para. 74.
[55] ICC-OTP, Statement of ICC Prosecutor on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh, 18 September 2018.

293. The Office further engaged with relevant stakeholders, including victims' groups and civil society, both at the seat of the Court and during missions to Bangladesh. In Cox's Bazaar, the delegation visited refugee camps and met with government authorities, humanitarian agencies and NGOs, as well as a number of victims' representatives. The delegation also exchanged with representatives of various agencies, including the UN, members of the diplomatic community and academics.

294. On 4 July 2019, following the Office's preliminary examination process, the Prosecutor requested authorisation from Pre-Trial Chamber III to investigate the situation in Bangladesh/Myanmar in the period since 9 October 2016. Specifically, the Prosecutor requested authorisation to investigate crimes within the jurisdiction of the Court in which at least one element occurred on the territory of Bangladesh, and which occurred within the context of two waves of violence in Rakhine State on the territory of Myanmar, as well as any other crimes which are sufficiently linked to these events.[56] On the same day, the Prosecutor notified victims and victims' representatives seeking to make representations to Pre-Trial Chamber III on the Prosecutor's request that the deadline for so doing was 28 October 2019.

295. Pre-Trial Chamber III received views on the Prosecutor's request by or on behalf of hundreds of thousands of alleged victims. The victims' representations, collected by the Victims Participation and Reparations Section of the Registry, confirmed the information provided by the Office in its request, including the alleged coercive acts of killings, arbitrary arrests, infliction of pain and injuries, sexual violence, and destruction of houses and buildings. The victims' representations also reflected the immense gravity of the alleged crimes and their alleged commission with discriminatory intent.

296. On 14 November 2019, Pre-Trial Chamber III authorised the commencement of an investigation into this situation.[57] On the issue of territorial jurisdiction, the Chamber agreed with the 2018 conclusion of Pre-Trial Chamber I that the Court may exercise jurisdiction over crimes when part of the criminal conduct takes place on the territory of a State Party. The Chamber concluded that, "[t]he alleged deportation of civilians across the Myanmar-Bangladesh border, which involved victims crossing that border, clearly establishes a territorial link on the basis of the *actus reus* of this crime (*i.e.* the crossing into Bangladesh by the victims)".[58]

297. The Chamber found that there was a reasonable basis to believe that the alleged crimes of deportation and persecution may have been committed. The Chamber

[56] Request for authorisation of an investigation pursuant to article 15, 4 July 2019.
[57] Decision pursuant to article 15 of the Rome Statute on the authorisation of an investigation into the situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019.
[58] Decision pursuant to article 15 of the Rome Statute on the authorisation of an investigation into the situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019, para. 62.

did not find it necessary to form any view on the crime of other inhumane acts, but noted that the Prosecutor is not restricted to investigating only the events mentioned in her request let alone their legal characterisation. The Chamber accordingly authorised an investigation in relation to *any crime*, including any future crime, within the jurisdiction of the Court committed at least in part on the territory of Bangladesh or on the territory of any other State Party or State making a declaration under article 12(3) of the Statute, if the alleged crime is sufficiently linked to the situation as described in the decision, irrespective of the nationality of the perpetrators. As for the time period, the Chamber authorised the investigation of crimes allegedly committed on or after 1 June 2010, the date of entry into force of the Statute for Bangladesh, and, in relation to crimes allegedly committed at least in part on the territory of other States Parties - after the date of entry in force of the Statute for those States Parties.

298. The Chamber emphasised that the Prosecutor is not restricted to investigating the incidents identified in her request and could, on the basis of evidence gathered during the investigation, extend the investigation to other crimes as long as they remain within the parameters of the authorised investigation. Similarly, the Chamber noted that the Prosecutor is not restricted to the persons or groups of persons identified in her request.

299. In relation to admissibility, Pre-Trial Chamber III found that there is no information currently available to indicate that any potential future case would be inadmissible. It found that in view of the scale of the alleged crimes and the number of approximately 600,000 to one million Rohingya victims allegedly forcibly displaced from Myanmar to Bangladesh, the case clearly reached the gravity threshold. Noting the victims' views, the Chamber agreed with the Prosecutor that there are no substantial reasons to believe that an investigation into the situation would not be in the interests of justice.

300. Subsequent to Pre-Trial Chamber III's decision, and in accordance with article 18 of the Statute, the Office has notified all States Parties and those States which would normally exercise jurisdiction over the alleged crimes concerned of its initiation of an investigation into this situation. Pre-Trial Chamber III noted in its decision that it would receive and entertain an application by the Prosecutor should Myanmar ask for a deferral on the basis of article 18(2) of the Statute. The Chamber further noted that specific challenges to the admissibility of specific cases can be brought at a later stage, pursuant to article 19 of the Statute.

301. In accordance with Pre-Trial Chamber III's authorisation decision, the Office has commenced its investigation into the situation in Bangladesh/Myanmar. The Office will pursue its mandate independently, impartially and objectively, and will examine allegations against all groups or parties within the situation in order to assess whether persons belonging to those groups or parties bear criminal responsibility under the Statute. | **OTP**